(1) Docket for 02-8636

No. 02-8636 Status: DECIDED
Title: Clyde Timothy Bunkley, Petitioner
v.
Florida

Docketed: January 24, 2003 Lower Ct: Supreme Court of Florida (SC01-297)

Date	Proceedings and Orders
Jan 14 2003	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due February 23, 2003)
Feb 4 2003	Waiver of right of respondent Florida to respond filed.
Feb 6 2003	DISTRIBUTED for Conference of February 21, 2003
Feb 19 2003	Response requested.
Mar 21 2003	Brief of respondent Florida in opposition filed.
Mar 31 2003	Reply brief of petitioner Clyde Timothy Bunkley filed.
Apr 3 2003	REDISTRIBUTED for Conference of April 18, 2003
Apr 21 2003	REDISTRIBUTED for Conference of April 25, 2003
Apr 28 2003	REDISTRIBUTED for Conference of May 2, 2003
May 12 2003	REDISTRIBUTED for Conference of May 15, 2003
May 19 2003	REDISTRIBUTED for Conference of May 22, 2003
May 27 2003	Petition GRANTED. Judgment VACATED and case REMANDED The Chief Justice dissents, joined by Justices Kennedy and Thomas. Opinion per curiam. (Detached opinion.)
	**********
Jun 26 2003	MANDATE ISSUED.

Name	Address	Phone
Attorneys for Petitioner:		
Clyde T. Bunkley	#051390, A.P.C.I. P.O. Box 1100 Avon Park, FL 33826-1100	
Party name: Clyde Timothy Bunkley		
Attorneys for Respondent:		
Robert J. Krauss	AG's Ofc., Concourse Center 4 3507 E. Frontage Rd., Ste. 200 Tampa, FL 33607-7013	8132877900
Party name: Florida		

1pp

NO. 02-8636

Supreme Court, U.S.
FILED
JAN 14 2003
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

CLYDE TIMOTHY BUNKLEY – PETITIONER

VS.

STATE OF FLORIDA – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

Clyde Timothy Bunkley

Clyde T. Bunkley, #051390
Avon Park Correctional Institution
P.O. Box 1100
Avon Park, Fla. 33826-1100
(No Phone Number)

53 pp

QUESTION PRESENTED

Whether Petitioner was denied due process of law by the State of Florida's refusal to apply the recently interpreted Florida Supreme Court definition regarding the "common pocket knife" exclusion to the weapons statute, in direct contradiction with the United States Supreme Court's recent decision in *Fiore v. White*, 531 U.S. 225 (2001)?

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the Court whose judgment is the subject of this petition is as follows:

Richard E. Doran,	Attorney General of Florida
Robert J. Krauss,	Senior Assistant Attorney General
Ronald, Napolitano,	Assistant Attorney General

TABLE OF CONTENTS

	PAGE #
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTION AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3-4
REASON FOR GRANTING THE WRIT	5-8
CONCLUSION	9

INDEX TO APPENDICIES

APPENDIX A Opinion of the Florida Supreme Court, denying relief, dated November 21st, 2002. Case No. SC01-297.

APPENDIX B Opinion of the Second District Court of Appeal of Florida, denying appeal and certifying question of great public importance, dated September 1st, 2000. Case No. 2D99-4511.

APPENDIX C Opinion of the Twelfth Judicial Circuit Court, in and for Sarasota County, Florida, denying post-conviction relief, dated October 19th, 1999. Case No. 86-1070-CF-A-N1.

APPENDIX D Mandate of the Florida Supreme Court, dated December 12th, 2002. Case No. SC01-297.

TABLE OF AUTHORITIES CITED

CASES	PAGE #
Arroyo v. State, 564 So. 2d 1153 (Fla. 4th DCA 1990)	6
Bunkley v. State, 539 So. 2d 477 (Fla. 2d DCA 1989)	3
Bunkley v. State, 768 So. 2d 510 (Fla. 2d DCA 2000)	4
Bunkley v. State, 27 Fla. L. Weekly S967b (Fla. Nov. 21st, 2002)	4
Drummer v. State, 33 So. 1008 (Fla. 1903)	5
Fiore v. White, 531 U.S. 225 (2001)	7,8,9
L.B. v. State, 700 So. 2d 370 (Fla. 1997)	3,5,6,7,9
McCoy v. State, 789 So. 2d 489 (Fla. 2d DCA 2001)	6,8
State v. Klayman, 27 Fla. L. Weekly S951 (Fla. Nov. 14th, 2002)	7
State v. Nixon, 295 So. 2d 121 (Fla. 3d DCA 1974)	6
Walls v. State, 730 So. 2d 294 (Fla. 1st DCA 1999)	6
STATUTES AND RULES	
Fla. Stat. Sec. 790.001(13) (1985)	2
Fla. Stat. Sec. 810.02 (1985)	2
OTHER	
Op. Atty. Gen. 051-358	6

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is reported at 27 Fla. L. Weekly S 967b (Fla. Nov. 21st, 2002).

JURISDICTION

The date on which the highest state court decided my case was December 12th, 2002. A copy of same appears at Appendix D.

The jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due Process Clause of the 14th Amendment to the U.S. Constitution

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Florida Statute Sec. 810.02 Burglary. - (1985)

> "(1) "Burglary" means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.
>
> (2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment or as provided in Sec. 775.082, Sec. 775.083, or Sec. 775.084, if, in the course of committing the offense, the offenders:
>
> (a) Makes an assault or battery upon any person.
>
> (b) Is armed, or arms himself within such structure or conveyance, with explosives or a dangerous weapon.
>
> (3) If the offender does not make an assault or battery or is not armed, or does not arm himself, with a dangerous weapon or explosive . . ., burglary is a felony of the third degree."

Florida Statute Sec. 790.001 Definitions. - (1985)

> "(13) "Weapon" means any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common pocket knife."

STATEMENT OF THE CASE

Petitioner is incarcerated in a Florida prison on the charge of armed burglary. Petitioner's conviction stems from a break-in to an unoccupied, closed restaurant where Petitioner was found to have a pocket knife in his pocket at arrest. Said pocket knife had a blade length of 2 ½ to 3 inches, was in Petitioner's pocket and in a folded position (closed) at all times related to the burglary.

Petitioner was convicted by jury on April 23, 1987 and sentenced to life in prison. Petitioner's direct appeal was *per curiam* affirmed on February 17, 1989. See *Bunkley v. State*, 539 So. 2d 477 (Fla. 2d DCA 1989)(Table).

Petitioner sought post-conviction relief via a variety of motions and petitions throughout the 1990's, all to no avail.

On October 2nd, 1997, the Florida Supreme Court decided, in *L.B. v. State*, 700 So.2d 370 (Fla. 1997), that the "common pocket knife" exclusion to the weapons definition statute (Sec. 790.001 (13)) was not unconstitutionally vague, and that a folding pocket knife with a blade 4" or less in length meets that definition without question. *Id* at 373.

On September 21st, 1999, Petitioner filed a 3.850 motion for post-conviction relief related to the decision in *L.B.*. The trial court dismissed said motion, on October 19th, 1999, due to no indication as to whether *L.B.* applied retroactively.

On appeal, to the Second DCA, Petitioner was denied relief, but a question was certified to the Florida Supreme Court. See *Bunkley v. State*, 768 So. 2d 510 (Fla. 2d DCA 2000).

On November 21st, 2002, the Florida Supreme Court decided – after briefing and oral arguments – that their decision in *L.B.* did not apply retroactively, therby denying Petitioner relief. See *Bunkley v. State*, 27 Fla. L. Weekly S 967b (Fla. Nov. 21st, 2002).

Mandate issued on December 12th, 2002.

This petition follows timely.

REASONS FOR GRANTING THE PETITION

Petitioner's simple burglary, which he does not contest here, was enhanced to "armed" burglary solely on the fact that Petitioner had a pocket knife in his pocket, unopened, at the time of his arrest. The pocket knife had a 2 ½" to 3" blade, as can be seen from the face of the trial record, and was not used or brandished at all during the course of the burglary of the unoccupied (closed) restaurant.

The dangerous weapon portion of Florida's burglary statute (Sec. 810.02(2)(b) (1985) does not, itself, define "dangerous weapon". Courts in Florida, therefore, have traditionally turned to Florida's weapons statute (Sec. 790.001(13) (1985) for a conclusive definition. The weapons statute, since 1901, has included an exemption for a "common pocket knife".

There have been several lower court opinions in Florida over the years, as to what constitutes a "common pocket knife". The Florida Supreme Court, however, did not enter an opinion until October 2nd, 1997. See *L.B. v. State*, 700 So. 2d 370 (Fla. 1997). An exhaustive electronic search of every Florida Supreme Court published opinion since 1901 revealed only one other prior case that even mentioned the word "pocket knife" (*Drummer v. State*, 33 So. 1008, 1009 (Fla. 1903), and they did **not** define the term then as it was a firearm murder case.

L.B., then, cannot be seen as an evolution of the law, as it was the very first time the Supreme Court had ever interpreted the "pocket knife" exemption of Florida's weapon statute.

In *L.B.*, the Supreme Court held that the 3 ¾" long blade in that case clearly fell under **ANY** intended definition of the term "common pocket knife". See *L.B.* at 373. In so doing, the Court cited to a 1951 opinion of the Attorney General of Florida (051-358), wherein it was stated that a pocket knife with a blade of four inches in length or less was a "common pocket knife". The Court went even further, in their (#4) footnote to say that four inches is not a bright line rule (i.e. a folding knife of **MORE** that 4" blade could also be considered a "common pocket knife").

We need not go to these extremes in the instant cause, as Petitioner Bunkley's blade was a mere 2 ½" to 3" in length – thereby falling clearly within the range established by *L.B.*

There can be no doubt that the factual basis of Bunkley's case does **NOT** support an armed burglary charge. See for example *McCoy v. State*, 789 So. 2d 489 (Fla. 2d DCA 2001)(decided ten months after Bunkley's denial in that same court). See also *Walls v. State*, 730 So. 2d 294 (Fla. 1st DCA 1999); *Arroyo v. State*, 564 So. 2d 1153 (Fla. 4th DCA 1990); *State v. Nixon*, 295 So. 2d 121 (Fla. 3d DCA 1974).

The only question, then, is whether Bunkley's unlawful conviction and overwhelming sentence should be allowed to stand, in lieu of the fact that *L.B.* established that a pocket knife with a blade of 4" or less was by law a "common pocket knife" – Thereby excluding it without question from the legal definition of a "weapon".

Absent the enhancement of a "weapon", Bunkley's maximum statutory sentence is five (5) years prison. As Mr. Bunkley has already served over sixteen (16) years actual time, he should be immediately released from prison!

In *Fiore v. White*, 531 U.S. 225 (2001) this Court held that constitutional principles of due process are violated when a state convicts and incarcerates an individual for conduct that the State's "criminal statute, as properly interpreted, does not prohibit". *Id* at 228.

Fiore was briefly mentioned during oral arguments, and given a dismissive footnote in Bunkley's Florida Supreme Court opinion. Petitioner Bunkley believes that *Fiore* is directly on point, and should be applied likewise in his case.

Furthermore, the Florida Supreme Court had even recognized *Fiore's* applicability to state law. See *State v. Klayman*, 27 Fla. L. Weekly S951 (Fla. Nov. 14th, 2002), a case decided one week before the instant cause.

The bottom line is that *L.B.* clarified that Bunkley's possession of a folded pocket knife with a blade less than 4" long did not constitute criminal conduct and

thus he could not and should not have been convicted of armed burglary. Under *Fiore*, due process principles of fundamental fairness require that Bunkley be entitled to relief from his continued incarceration.

The fair administration of justice, will be seriously undermined if a criminal defendant, such as Bunkley, is required to serve a life sentence under the Florida burglary statute; while a defendant who engaged in the same conduct, under the self same statute, subsequent to *L.B.* is required to serve only five years. See *McCoy, supra*.

CONCLUSION

In conclusion, as in *Fiore*, Bunkley's "continued incarceration" on this charge violates due process because the essential element of possessing a "weapon" in order to be convicted of "armed" burglary does not, and never did, exist in Bunkley's case as *L.B.* clarified that point of law.

The petition for writ of certiorari should be granted.

Respectfully submitted,

Clyde Timothy Bunkley
Clyde T. Bunkley, *pro se*

Date: 1/13/2003

Supreme Court of Florida

No. SC01-297

CLYDE TIMOTHY BUNKLEY,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

[November 21, 2002]

SHAW, J.

We have for review Bunkley v. State, 768 So. 2d 510 (Fla. 2d DCA 2000), wherein the district court certified the following question:

> Should the decision in L.B. v. State, 700 So. 2d 370 (Fla. 1997), that a folding pocketknife with a blade of four inches or less falls within the

> statutory exception to the definition of a "weapon" found in § 790.001(13), be applied retroactively?

Bunkley, 768 So. 2d at 511. We have jurisdiction. See art. V, § 3(b)(4), Fla. Const. We answer in the negative, as explained herein.

I. FACTS

Bunkley burglarized an unoccupied Western Sizzlin' Restaurant on April 23, 1987. He was arrested at the scene and later charged with and convicted of armed burglary, possession of burglary tools, and resisting arrest without violence. In light of his fifteen prior convictions, he was sentenced to life imprisonment on the armed burglary count, five years' imprisonment on the possession of burglary tools count, and six months' imprisonment on the resisting arrest count. His convictions and sentences were affirmed.[1]

Bunkley subsequently sought postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 and the relevant facts are set forth in the district court opinion below:

> Bunkley was convicted of armed burglary after a jury trial on April 23, 1987. The arresting officer testified as to the following facts: Bunkley broke into a closed, unoccupied Western Sizzlin' Restaurant in the early morning hours, and was apprehended after leaving the structure with a common pocketknife in his pocket. At the time of Bunkley's arrest, the pocketknife, with a blade of 2½ to 3 inches in

1. See Bunkley v. State, 539 So. 2d 477 (Fla. 2d DCA 1989).

> length, was folded and in his pocket. There is no evidence indicating Bunkley ever used the pocketknife during the burglary, nor that he threatened anyone with the pocketknife at any time.
>
> In his rule 3.850 motion, Bunkley contends the trial court erroneously allowed the jury to determine whether the pocketknife found in his possession could be considered a deadly weapon, rather than concluding it was not as a matter of law. Bunkley concedes that his motion was filed more than two years after his convictions on April 23, 1987, became final. He contends, however, that the arguments raised in his motion were not supported by case law until the supreme court decided L.B. v. State, 700 So. 2d 370 (Fla. 1997), and that he filed his motion within two years from the date of that decision.
>
> In L.B., the Florida Supreme Court reversed this court's decision finding section 790.001(13), Florida Statutes (1995), unconstitutionally vague. At issue was the exclusion of a "common pocketknife" from the definition of "weapon" in section 790.001(13). The Florida Supreme Court found that the statutory term was not so vague as to fail to put people of ordinary intelligence on notice of what constitutes forbidden conduct under the statute. To define the term, the court relied upon an Attorney General's opinion that a common pocketknife was one with a blade of four inches or less.

Bunkley, 768 So. 2d at 510 (citations omitted). The district court declined to apply L.B. retroactively, affirmed the denial of rule 3.850 relief, and certified the above question.

The issue presented in this case, i.e., whether a decision of this Court must be applied retroactively, is a pure question of law, subject to de novo review.[2]

II. L.B. v. STATE

2. See State v. Glatzmayer, 789 So. 2d 297, 301-02 n.7 (Fla. 2001) ("If the ruling consists of a pure question of law, the ruling is subject to de novo review.").

The petitioner in L.B. v. State, 700 So. 2d 370 (Fla. 1997), was charged with and convicted of possessing a "weapon" on school grounds based on her possession of a folding knife with a 3¾-inch blade:

> At trial, the court considered whether petitioner's knife fit within the "common pocketknife" exception to the definition of "weapon" contained in section 790.001(13), Florida Statutes (1995). Section 790.001(13) provides:
>
> > "Weapon" means any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common pocketknife.
>
> The trial court found that petitioner's knife was too large to be considered a "common pocketknife," and was therefore a "weapon" within the meaning of sections 790.001(13) and 790.115(2). Accordingly, the trial court found appellant guilty of the violation.
>
> On appeal, the Second District vacated the trial court's order and remanded the case for a new trial. The district court held that section 790.001(13) is unconstitutionally vague insofar as it excludes "common pocketknives" from the definition of "weapon."

L.B., 700 So. 2d at 371 (footnote and citations omitted).

This Court disagreed that the phrase "common pocketknife" was unconstitutionally vague:

> The legislature's failure to define the term "common pocketknife" in section 790.001(13) does not render that term unconstitutionally vague. Moreover, a court may refer to a dictionary to ascertain the plain and ordinary meaning which the legislature intended to ascribe to the term.
>
> [The Court then set forth dictionary definitions of the terms

> "common" and "pocketknife."] From these definitions, we can infer that the legislature's intended definition of "common pocketknife" was: "A type of knife occurring frequently in the community which has a blade that folds into the handle and that can be carried in one's pocket." We believe that in the vast majority of cases, it will be evident to citizens and fact-finders whether one's pocketknife is a "common" pocketknife under any intended definition of that term.

L.B., 700 So. 2d at 372 (citations omitted).

The Court concluded that the petitioner's knife plainly fell within the meaning of "common pocketknife" but added the following caveat:

> We note that neither the Attorney General nor this Court maintains that four inches is a bright line cutoff for determining whether a particular knife is a "common pocketknife." We merely hold that appellant's knife fits within the exception to the definition of weapon found in section 790.001(13).

L.B., 700 So. 2d at 373 n.4.

III. THE APPLICABLE STATUTES

The burglary statute, which differentiates between simple and armed burglary, provides in relevant part:

> 810.02 Burglary.—
>
> (1) "Burglary" means entering or remaining in a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.
>
> (2) Burglary is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment . . . if, in the course of committing the offense, the offender:
>
> . . . .

(b) Is armed, or arms himself within such structure or conveyance, with explosives or a dangerous weapon.

(3) . . . Otherwise, burglary is a felony of the third degree, punishable [by a term of imprisonment not exceeding five years].

§ 810.02, Fla. Stat. (1985) (emphasis added).

The phrase "dangerous weapon" has appeared in the above statute since it was enacted in 1895[3] and is not defined therein. To determine the meaning of that phrase, courts traditionally have turned to chapter 790, Florida Statutes, entitled "Weapons and Firearms." Section 790.001 defines the term "weapon" and expressly excepts a "common pocketknife":

(13) "Weapon" means any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common pocketknife.

§ 790.001(13), Fla. Stat. (1985) (emphasis added).[4] This definition was based on the description of "weapon" found in the precursor statute, section 790.01, which was enacted in 1901 and also excepted a "common pocketknife."[5]

IV. CHANGES IN THE LAW

Intent is a polestar that guides a court's inquiry into whether a change in the

3. See ch. 4405, § 1, at 167-68, Laws of Fla. (1895).

4. See ch. 69-306, § 1, at 1106, Laws of Fla.

5. See ch. 4928, § 1, at 57, Laws of Fla. (1901).

law should be given prospective or retroactive application. As a rule, a change in the statutory law is presumed to operate prospectively absent a clear showing of contrary intent.[6] A change in the decisional law in a nonfinal case, on the other hand, is presumed to operate in all other nonfinal cases.[7] A change in either the statutory or decisional law may operate retroactively when retroactive application is expressly provided,[8] but regardless of intent, the issue of retroactivity is ultimately controlled by overarching constitutional principles.

The Court in Witt v. State, 387 So. 2d 922 (Fla. 1980), was confronted with the following question: must a change in the law that is announced in a nonfinal case be applied in final cases?[9] The Court held that only "jurisprudential upheavals" will

6. See, e.g., Bates v. State, 750 So. 2d 6, 10 (Fla. 1999).

7. See Smith v. State, 598 So. 2d 1063 (Fla. 1992).

8. See, e.g., Bates, 750 So. 2d at 10.

9. The Court in subsequent cases was confronted with the following question: must a change in the law that is announced in a final case be applied in other final cases? The Court answered as explained therein. See, e.g., Ferguson v. State, 789 So. 2d 306 (Fla. 2001) (applying retroactively Carter v. State, 706 So. 2d 873 (Fla. 1997), wherein the Court held that a judicial determination of competency is required in certain postconviction cases); Johnston v. Moore, 789 So. 2d 262 (Fla. 2001) (declining to apply retroactively Stephens v. State, 748 So. 2d 1028 (Fla. 1999), wherein the Court announced a revised standard of review for ineffectiveness claims); Mitchell v. Moore, 786 So. 2d 521 (Fla. 2001) (applying retroactively the decision in the same case, i.e., Mitchell, wherein the Court held that a photocopy requirement for postconviction pleadings impermissibly burdened

be applied in final cases, and that "evolutionary refinements" in the law will not be applied in final cases. The Court explained:

> We emphasize at this point that only major constitutional changes of law will be cognizable . . . under Rule 3.850. Although specific determinations regarding the significance of various legal developments must be made on a case-by-case basis, history shows that most major constitutional changes are likely to fall within two broad categories. The first are those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties. This category is exemplified by Coker v. Georgia, which held that the imposition of the death penalty for the crime of rape of an adult woman is forbidden by the eighth amendment as cruel and unusual punishment. The second are those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter. Gideon v. Wainwright, of course, is the prime example of a law change included within this category.
>
> In contrast to these jurisprudential upheavals are evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters. Emergent rights in these categories, or the retraction of former rights of this genre, do not compel an abridgment of the finality of judgments. To allow them that impact would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit.

Witt, 387 So. 2d at 929-30 (citations and footnotes omitted).

In brief, changes in the decisional law are divided into two subgroups for retroactivity purposes. A "jurisprudential upheaval" is a major constitutional

---

indigent defendants).

change of law, announced by either this Court or the United States Supreme Court, that addresses a basic unfairness in the system. The unfairness must be so fundamental that it undermines confidence in the validity of final cases and outweighs the doctrine of finality.[10] An "evolutionary refinement," on the other hand, is a conventional change that affords new or different guidelines for Florida courts in exercising their authority in applying the law.[11] Jurisprudential upheavals

---

10. For examples of jurisprudential upheavals, see the following: James v. State, 615 So. 2d 668 (Fla. 1993) (addressing Espinosa v. Florida, 505 U.S. 1079 (1992), wherein Florida's jury instruction on the "heinous, atrocious, or cruel" aggravating circumstance was held to be impermissibly vague under the Eighth Amendment); Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989) (addressing Booth v. Maryland, 482 U.S. 496 (1987), wherein the use of victim impact evidence in a capital trial was held to be irrelevant and impermissibly inflammatory in violation of the Eighth Amendment; the United States Supreme Court later receded from Booth in Payne v. Tennessee, 501 U.S. 808 (1991)); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987) (addressing Hitchcock v. Dugger, 481 U.S. 393 (1987), wherein Florida's jury instructions in capital cases were held to impermissibly limit the sentencer's consideration of nonstatutory mitigating circumstances in violation of the Eighth Amendment).

11. For examples of evolutionary refinements, see the following: State v. Woodley, 695 So. 2d 297 (Fla. 1997) (addressing State v. Gray, 654 So. 2d 552 (Fla. 1995), wherein the Court held that the legal basis for the crime of attempted felony murder was too cumbersome to be countenanced any longer by the courts); State v. Glenn, 558 So. 2d 4 (Fla. 1990) (addressing Carawan v. State, 515 So. 2d 161 (Fla. 1987), wherein the Court announced a revised procedure for determining whether multiple convictions can arise from a single criminal act under Blockburger v. United States, 284 U.S. 299 (1932)); McCuiston v. State, 534 So. 2d 1144 (Fla. 1988) (addressing Whitehead v. State, 498 So. 2d 863 (Fla. 1986), wherein the Court held that habitual offender status is an invalid ground for departure from the sentencing guidelines).

are applied retroactively; evolutionary refinements are not applied retroactively. We add that, as opposed to "changes" in the law, an entirely separate body of precedent, i.e., "clarifications" in the law, has no application under Florida law in the context of retroactivity.[12]

V. THE PRESENT CASE

In analyzing the retroactivity of L.B. under Witt, we are called upon to determine whether L.B. was a "jurisprudential upheaval" or an "evolutionary refinement" in the law. As noted above, a jurisprudential upheaval is a "major constitutional change of law." Examples include Gideon v. Wainwright, 372 U.S. 335 (1963), and Coker v. Georgia, 433 U.S. 584 (1977). L.B. clearly was not a decision of that order, for L.B. was a routine statutory construction case wherein this Court construed the phrase "common pocketknife."

Rather, L.B. was an "evolutionary refinement" in the law, i.e., it was a

12. The United States Supreme Court, in addressing a decision rendered under Pennsylvania law, pointed out that certain decisions are not subject to a retroactivity analysis:

> The Pennsylvania Supreme Court's reply specifies that the interpretation of [the statute] set out in Scarpone "merely clarified" the statute and was the law of Pennsylvania—as properly interpreted—at the time of Fiore's conviction. Because Scarpone was not new law, this case presents no issue of retroactivity.

Fiore v. White, 531 U.S. 225, 228 (2001). Fiore is inapplicable to the present case.

conventional change that "affords new or different guidelines" for the courts in applying the law. To determine whether a decision refines a statute, we first look to the decision itself to discern its intent. If the decision is silent or ambiguous on this point, we then look to the statute to discern its intent. Where the Legislature cedes a measure of discretion to the courts either directly[13] or by employing language that commonly requires judicial construction,[14] the Legislature intends for the courts to effectuate the purpose of the statute by "refining" the decisional law in the face of "evolving" circumstances.

The Legislature, at the turn of the century, ceded discretion to the courts by employing the phrases "dangerous weapon" and "common pocketknife" in the

13. For example, the Legislature directly ceded to the courts the authority to formulate grounds for departing from the sentencing guidelines. See § 921.001(6), Fla. Stat. (2001) ("A court may impose a departure sentence outside the sentencing guidelines based upon circumstances or factors which reasonably justify the aggravation or mitigation of the sentence . . . .").

14. Examples of such language include "careful and prudent," "reasonable," and "probable cause." See, e.g., § 316.1925, Fla. Stat. (2001) ("Any person operating a vehicle upon the streets or highways within the state shall drive the same in a careful and prudent manner . . . .") (emphasis added); § 856.015(2), Fla. Stat. (2001) ("No adult having control of any residence shall allow an open house party to take place at said residence if any alcoholic beverage or drug is possessed or consumed . . . by any minor . . . and where the adult fails to take reasonable steps to prevent the possession or consumption of the alcoholic beverage or drug.") (emphasis added); § 933.04, Fla. Stat. (2001) ("[N]o search warrant shall be issued except upon probable cause . . . .") (emphasis added).

burglary and weapon statutes, and these phrases clearly required judicial construction in order to provide a meaningful basis for imposing sanctions. This Court's decision in L.B., which was issued in 1997, was the culmination of a century-long evolutionary process. Although some courts during that period may have interpreted "common pocketknife" contrary to the holding in L.B., each court nevertheless sought to comply with legislative intent and to rule in harmony with the law as it was interpreted at that point in time. A key consideration is that none of the courts attempted to impose criminal sanctions without statutory authority—i.e., none ruled in contravention of legislative intent. Thus, none of the convictions imposed pursuant to section 790.001(13) violated the Due Process Clause in this regard.

VI. CONCLUSION

This Court's decision in L.B. is not a jurisprudential upheaval under Witt, for L.B. was not a "major constitutional change of law." Rather, L.B. was a routine statutory construction case wherein this Court construed and refined the phrase "common pocketknife" in the face of evolving circumstances in the field. The decision thus "affords new or different" guidelines for Florida courts to use in applying the statute and is an evolutionary refinement in the law.

We answer the certified question in the negative and hold that L.B. cannot be

given retroactive application and applied to final cases. We approve Bunkley v. State, 768 So. 2d 510 (Fla. 2d DCA 2000), as explained herein.

It is so ordered.

WELLS, LEWIS, and QUINCE, JJ., and HARDING, Senior Justice, concur.
PARIENTE, J., dissents with an opinion, in which ANSTEAD, C.J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

PARIENTE, J., dissenting.

I dissent because in my opinion under the recent United States Supreme Court decision in Fiore v. White, 531 U.S. 225 (2001), this Court's decision in L.B. v. State, 700 So. 2d 370 (Fla. 1997), should be applied to grant Bunkley collateral relief. If Fiore is deemed inapplicable, then in my view Bunkley is still entitled to relief based on the principles of retroactivity articulated in Witt v. State, 387 So. 2d 922 (Fla. 1980).

In this case, Bunkley was convicted of armed burglary in 1987 for breaking into an unoccupied restaurant, and received a life sentence. See Bunkley v. State, 768 So. 2d 510, 510 (Fla. 2d DCA 2000). The "weapon" that enhanced the

burglary from simple burglary to armed burglary was a common pocketknife with a blade of two-and-a-half to three inches that was folded in his pocket at the time of the burglary. See id. There was "no evidence indicating that Bunkley ever used the pocketknife during the burglary, nor that he threatened anyone with the pocketknife at any time." Id. At all pertinent times, section 790.001(13), Florida Statutes (1985), expressly excepted a "common pocketknife" from the definition of a "weapon." Subsequent to Bunkley's conviction, this Court in L.B. held for the first time that the proper definition of a "common pocketknife" included any pocketknife with a blade four inches in length or less. See 700 So. 2d at 373. Thus, any common pocketknife with a blade of four inches or less was not a "weapon" as a matter of law under section 790.001(13), the weapons statute. See id.

In my view, the principles of due process enunciated in Fiore require that Bunkley receive the benefit of the Court's clarification of the law in L.B. Fiore holds that constitutional principles of due process are violated when a state convicts and incarcerates an individual for conduct that the state's "criminal statute, as properly interpreted, does not prohibit." 531 U.S. at 228. At issue in Fiore was an opinion of the Pennsylvania Supreme Court that for the first time established that a criminal statute, as properly interpreted, did not prohibit the defendant's conduct

at the time of the conviction. See id. In those circumstances, the United States Supreme Court explained that the state supreme court had issued a clarification of the law that applied to that defendant, and retroactivity was not an issue. See id. The Court explained:

> This Court's precedents make clear that Fiore's conviction and continued incarceration on this charge violate due process. We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt. In this case, failure to possess a permit is a basic element of the crime of which Fiore was convicted. . . .
>
> The simple, inevitable conclusion is that Fiore's conviction fails to satisfy the Federal Constitution's demands.

Id. at 228-29 (emphasis supplied) (citations omitted).

This Court recently acknowledged Fiore's applicability to Florida law in State v. Klayman, 27 Fla. L. Weekly S951(Fla. Nov. 14, 2002). In Klayman, a majority of this Court stated that "a simple clarification in the law does not present an issue of retroactivity and thus does not lend itself to a Witt analysis." Id. at S952. Yet, in this case, instead of analyzing why L.B. was not a clarification in the law entitling Bunkley to relief, the majority concludes, without discussion, that Fiore is not applicable. See majority op. at 10, note 12. Rather than discussing Fiore, which does not involve a retroactivity analysis, the majority analyzes L.B. based only on the principles of Witt, concluding that L.B. was "the culmination of a century-long

evolutionary process." Majority op. at 11-12. However, the majority offers no precedent laying out the stages of this evolution.

In fact, L.B. was the first statement by this Court as to what constitutes a "common pocketknife." In reaching this determination we relied on a 1951 Attorney General Opinion, not on a definition evolved through judicial precedent. See L.B., 700 So. 2d at 373. Thus, I would find Fiore applicable to this case.

As in Fiore, this Court's statement of the law in L.B. also correctly stated the law at the time Bunkley's conviction became final. Further, like the Pennsylvania Supreme Court's clarification of its law in Fiore, the armed burglary statute as "properly interpreted," Fiore, 531 U.S. at 228, places Bunkley's conduct outside the scope of that statute. In Fiore's terms, this Court issued a "clarification" of the law of what constitutes a "common pocketknife" under section 790.001(13). Thus, as in Fiore, Bunkley's "continued incarceration" on this charge violates due process because the essential element of possessing a "weapon" in order to be convicted of armed burglary does not exist in Bunkley's case.

Because L.B. is a clarification of the law, application of the due process principles of Fiore renders a retroactivity analysis under Witt unnecessary. However, assuming, as the majority does, that our decision in L.B. was a change in the law and not a clarification, Bunkley is also entitled to relief pursuant to Witt.

Witt outlined three requirements that decisional law must meet in order to be applied retroactively. See 387 So. 2d at 931. First, the decisional law must be issued by the Florida Supreme Court or the United States Supreme Court. See id. Second, the decisional law must be constitutional in nature. See id. Third, the change in law must constitute a major constitutional change of fundamental significance "where unfairness [is] so fundamental in either process or substance that the doctrine of finality [has] to be set aside." Id. at 927. There are two categories of changes that are sufficient to constitute fundamental significance: (1) "changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties" and (2) "jurisprudential upheavals" that meet the three-part test from Stovall v. Denno, 388 U.S. 293 (1967). Witt, 387 So. 2d at 929.

Our decision in L.B. undoubtedly meets the first two prongs of Witt. First, L.B. was decided by this Court. See 700 So. 2d at 373. Second, our decision in L.B. answered the question of whether the statute providing that a "common pocketknife" is not a "weapon" was unconstitutionally vague. See id. In answering that question in the negative, this Court held in the context of Florida constitutional law that any knife with a blade of less than four inches was not a "weapon" within the meaning of the statute. See id. at 372-73. Indeed, the definition of "common

pocketknife" we provided in L.B. was necessary to avoid a finding that the statute at issue was so vague as to unconstitutionally fail to give citizens proper notice as to what constituted criminal conduct. See id. at 371-73. Thus, our decision in L.B. was more than a "routine statutory construction case." Majority op. at 10 (emphasis supplied). Rather, L.B. construed a statute within the framework of our state constitution in order to ensure that citizens had legal notice at the time of the commission of the offense and to avoid declaring the statute unconstitutional, as the Second District had done. Therefore, L.B. had strong due process implications, making it constitutional in nature. Cf. Callaway v. State, 642 So. 2d 636, 640 (Fla. 2d DCA 1994) (decision is "constitutional in nature" if based primarily upon constitutional analysis), approved, 658 So. 2d 983 (Fla. 1995).

As to the third prong, I would hold that L.B. also meets the three-fold test articulated in Stovall and adopted by Witt. Under Stovall, consideration must be given to (i) the purpose to be served by the new rule, (ii) the extent of reliance on the old rule, and (iii) the effect that retroactive application of the rule will have on the administration of justice. See 388 U.S. at 297. First, L.B. serves two significant purposes. Primarily, L.B. prevents persons from being convicted of a crime for conduct never expressly prohibited by statute. L.B. also ensures that citizens are properly placed on notice as to what constitutes criminal conduct.

Both of these purposes have strong due process implications. See State v. Stevens, 714 So. 2d 347, 348 (Fla. 1998) (extending retroactivity to a decision holding that a 25-year mandatory minimum term was inapplicable to attempted second- and third-degree murder of a law enforcement officer "from the beginning" of statutory provision authorizing enhanced sentence); see also Fiore, 531 U.S. at 228-29; Callaway, 642 So. 2d at 640.

Second, Stovall requires that we consider the extent of reliance on the old rule. Although "common pocketknife" has been exempted from the definition of a "weapon" for many years, the extent of reliance is limited to very narrow circumstances. As this Court recognized in L.B., in "the vast majority of cases it will be evident whether one's particular knife is a 'common pocketknife.'" 700 So. 2d at 373.

The third factor for consideration under Stovall addresses the impact that retroactive application of the new rule will have on the administration of justice. Bunkley filed his motion for postconviction relief within two years from the date that L.B. became final. See Bunkley, 768 So. 2d at 510. The retroactive application of L.B., which would give affected inmates a two-year window to file for relief, would involve a straightforward legal issue and require, at most, a simple evidentiary hearing to determine the length of the blade of the pocketknife. Only

those defendants who could establish that the weapon they possessed was a common pocketknife of four inches or less would be entitled to relief.[15] As in Callaway, 658 So. 2d at 988, the record will normally be clear, and a determination concerning the length of the pocketknife should be accomplished easily at an evidentiary hearing.

As an overall consideration, this Court has held that when determining retroactivity, the "fundamental consideration is the balancing of the need for decisional finality against the concern for fairness and uniformity in individual cases." Id. at 986. In the ordinary case, decisional finality will trump other considerations, especially where the decision is one that applies "new or different standards for the admissibility of evidence" or pertains to issues of "procedural fairness." Witt, 387 So. 2d at 929. "In the limited number of decisions that are retroactively applied, we have determined that concerns for basic fairness and uniformity of treatment among similarly situated defendants outweigh any adverse impact that retroactive application of the rule might have on decisional finality." State v. Dixon, 730 So. 2d 265, 267 (Fla. 1999)

---

15. It should be noted that in reported opinions issued in the almost five years since L.B., the Second District opinion in this case is the sole reported appellate decision discussing the retroactivity of L.B.

In my view, this case is one of those limited number of decisions where retroactive application is required. As a result of L.B., we now know that Bunkley was convicted of the crime of "armed" burglary when the essential element of possessing a "weapon" was missing. Because of this conviction, he was eligible for and received a sentence of life imprisonment. With this Court's clarification in L.B. of what constitutes a "common pocketknife," the maximum sentence Bunkley could have received for simple burglary would have been five years. See § 810.02(3), Fla. Stat, (1985). Thus, Bunkley not only was convicted for conduct that the statute has never prohibited, but he is serving a substantially longer prison term.

The fair administration of justice would be seriously undermined if a criminal defendant, such as Bunkley, is required to serve a life sentence while a criminal defendant who engaged in the same conduct subsequent to L.B. is required to serve only five years. Cf. State v. Callaway, 658 So. 2d at 987 (noting that "the administration of justice would be more detrimentally affected if criminal defendants who had the misfortune to be sentenced during the six year window between the amendment of section 775.084 and the decision in Hale are required to serve sentences two or more times as long as similarly situated defendants who happened to be sentenced after Hale"). Bunkley should thus be entitled to the benefit of this

Court's decision in L.B. because the failure to give retroactive application of our decision in L.B. results in Bunkley serving a substantially longer sentence than a similarly situated prisoner.

The majority cites State v. Woodley, 695 So. 2d 297, 298 (Fla. 1997) as support for declining to apply L.B. retroactively. See majority op. at 9. However, when we declined to find the decision in State v. Gray, 654 So. 2d 552 (Fla. 1995), retroactive in Woodley, we did so because we had receded from eleven years of our own precedent establishing attempted felony murder as a valid offense. See Woodley, 695 So. 2d at 298; see also State v. Safford, 484 So. 2d 1244 (Fla. 1986) (declining to retroactively apply State v. Neil, 457 So. 2d 481 (Fla. 1984), which changed the long-standing rule in Florida that a party could never be required to explain the reasons for exercising peremptory challenges). In contrast, L.B. established as a matter of first impression in this Court that a closed, common pocketknife with a blade of four inches or less does not meet the definition in section 790.001(13) of a "weapon." That definition was crucial to an essential element of the aggravated offense of armed burglary, which requires possessing a weapon.[16] Retroactivity under these circumstances would be consistent with

16. Subsequent to L.B., the Legislature amended section 790.115, Florida Statutes, to specifically prohibit any "knife" from being exhibited on school

Callaway and Stevens, which made first-time statutory interpretations by this Court based on constitutional grounds retroactive, and with Woodley, in which we declined to extend retroactivity to a decision receding from our own precedent.

Finally, I am concerned that the majority neither acknowledges nor discusses in the Witt analysis the fundamental purpose of due process and retroactive application; that is, ensuring fairness and uniformity of individual adjudications. See Witt, 387 So. 2d at 925. It is difficult "'to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.'" Id. These important principles of fundamental fairness are essential to any analysis regarding the retroactive application of decisions from this Court.

The bottom line is that our holding in L.B. clarified that Bunkley's possession of a folded common pocketknife did not constitute criminal conduct and thus he could not have been and should not have been convicted of armed burglary. He is now serving a sentence of life imprisonment based on that conviction for armed burglary. Under both Fiore and Witt, due process principles of fundamental

grounds. See A.M. v. State, 765 So. 2d 927 (Fla. 2d DCA 2000). This legislation does not alter the definition of weapon in section 790.001(13) or the incorporation of that definition into the armed burglary provision under which Bunkley was convicted.

fairness require that Bunkley be entitled to pursue collateral relief.

ANSTEAD, C.J., concurs.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Second District - Case No. 2D99-4511

(Sarasota County)

R. John Cole, II, Sarasota, Florida,

for Petitioner

Richard E. Doran, Attorney General, Robert J. Krauss, Senior Assistant Attorney General, Chief of Criminal Law, and Ronald Napolitano, Assistant Attorney General, Tampa, Florida,

for Respondent

that sets out a per se rule. *See Walls v. State*, 730 So.2d 294 (Fla. 1st DCA 1999). Rule 3.850(b)(2) provides an exception to the two-year time limitation for filing postconviction motions where "a fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively." The test for determining whether an opinion should be applied retroactively was established in *Witt v. State*, 387 So.2d 922 (Fla.1980). In *Witt*, the court held that "only major constitutional changes of law" will be given retroactive effect so as to be cognizable under rule 3.850. *Id.* at 929. The court contrasted "major constitutional changes in the law" with "evolutionary refinements" in the law, stating:

> In contrast to jurisprudential upheavals are evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters....

Witt, 387 So.2d at 929–30.

In *State v. Glenn*, 558 So.2d 4, 6 (Fla. 1990), the supreme court explained its earlier opinion in *Witt*, stating:

> We held that only major constitutional changes of law which constitute a development of fundamental significance are cognizable under a motion for postconviction relief. Most such "jurisprudential upheavals" in the law fall within two broad categories, i.e., decisions ... which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties, and decisions ... which are of such significant magnitude as to necessitate retroactive application as determined by the three-prong test as applied in *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199] (1967).

(citations omitted).

Applying that test to this case, we hold that *L.B.* should not be applied retroactively. Accordingly, we affirm the trial court's order. However, because trial courts in Florida need a uniform statewide rule concerning the retroactivity of *L.B.*, we certify the following question as one of great public importance:

> SHOULD THE DECISION IN *L.B. v. STATE*, 700 SO.2D 370 (FLA.1997), THAT A FOLDING POCKETKNIFE WITH A BLADE OF FOUR INCHES OR LESS FALLS WITHIN THE STATUTORY EXCEPTION TO THE DEFINITION OF A "WEAPON" FOUND IN § 790.001(13), BE APPLIED RETROACTIVELY?

Affirmed.

BLUE, A.C.J., and CASANUEVA and DAVIS, JJ., Concur.

Joseph HERRMANN, Appellant,

v.

STATE of Florida, Appellee.

No. 2D00–1356.

District Court of Appeal of Florida, Second District.

Sept. 1, 2000.

Appeal pursuant to Fla. R.App. P. 9.140(i) from the Circuit Court for Pasco County; William R. Webb, Judge.

PER CURIAM.

Joseph Herrmann appeals the summary denial of his motion to correct a scoresheet error filed pursuant to Florida Rule of Criminal Procedure 3.800(a). Because Herrmann has stated a facially sufficient claim that is not refuted by the attachments to the trial court order, we reverse and remand for reconsideration.

Clyde Timothy BUNKLEY, Appellant,

v.

STATE of Florida, Appellee.

No. 2D99–4511.

District Court of Appeal of Florida, Second District.

Sept. 1, 2000.

Defendant who was convicted of armed burglary filed motion for postconviction relief. The Circuit Court, Sarasota County, Stephen L. Dakan, J., summarily denied motion, and defendant appealed. The District Court of Appeal held that *L.B. v. State* decision, holding that common pocket knife with blade of four inches or less was excluded from definition of "weapon," was not major change in law, but was merely evolutionary refinement of decisional law, and thus, it could not be retroactively applied through motion for postconviction relief.

Affirmed.

Question certified.

Criminal Law ⇐1456

L.B. v. State decision, holding that common pocket knife with blade of four inches or less was excluded from definition of "weapon," was not major change in law, but was merely evolutionary refinement of decisional law, and thus, it could not be retroactively applied through motion for postconviction relief. West's F.S.A. RCrP Rule 3.850.

R. John Cole, II, P.A., Sarasota, for Appellant.

No appearance required for Appellee.

PER CURIAM.

Clyde Timothy Bunkley appeals the summary denial of his motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We affirm.

Bunkley was convicted of armed burglary after a jury trial on April 23, 1987. The arresting officer testified as to the following facts: Bunkley broke into a closed, unoccupied Western Sizzlin' Restaurant in the early morning hours, and was apprehended after leaving the structure with a common pocketknife in his pocket. At the time of Bunkley's arrest, the pocketknife, with a blade of 2¼ to 3 inches in length, was folded and in his pocket. There is no evidence indicating Bunkley ever used the pocketknife during the burglary, nor that he threatened anyone with the pocketknife at any time.

In his rule 3.850 motion, Bunkley contends the trial court erroneously allowed the jury to determine whether the pocketknife found in his possession could be considered a deadly weapon, rather than concluding it was not as a matter of law. Bunkley concedes that his motion was filed more than two years after his convictions on April 23, 1987, became final. He contends, however, that the arguments raised in his motion were not, supported by case law until the supreme court decided *L.B. v. State*, 700 So.2d 370 (Fla.1997), and that he filed his motion within two years from the date of that decision.

In *L.B.*, the Florida Supreme Court reversed this court's decision finding section 790.001(13), Florida Statutes (1995), unconstitutionally vague. At issue was the exclusion of a "common pocketknife" from the definition of "weapon" in section 790.001(13). *See L.B.*, 700 So.2d at 371. The Florida Supreme Court found that the statutory term was not so vague as to fail to put people of ordinary intelligence on notice of what constitutes forbidden conduct under the statute. *See id.* To define the term, the court relied upon an Attorney General's opinion that a common pocketknife was one with a blade of four inches or less. *Id.* (citing Op. Att'y Gen. Fla. 051–358 (1951)). The decision has been characterized by the First District as one

BEST AVAILABLE COPY

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA, CASE NO. 86-1070-CF-A-N1

vs.

CLYDE TIMOTHY BUNKLEY,

Defendant.

_____/

ORDER DISMISSING MOTION FOR POSTCONVICTION RELIEF

This matter is before the court on the Defendant's Motion for Postconviction Relief filed through counsel pursuant to Fla.R.Crim.P. 3.850 on September 21, 1999. The court has carefully considered the motion, reviewed the court file, and is otherwise duly advised in the premises.

The Defendant was convicted by a jury of Armed Burglary, Possession of Burglary Tools, and Resisting Arrest and he was sentenced on the Armed Burglary conviction to life in the Department of Corrections. The court's judgments and sentences were affirmed on appeal. Bunkley v. State, 539 So. 2d 177 (Fla. 2d DCA 1989) (Table).

The Defendant has filed, since the original Second District Court of Appeal's opinion affirming his conviction, several Petitions for Writ of Habeas Corpus as well as a Motion for Post Conviction Relief, in both Federal and State court. All of the Defendant's previous attempts at collateral relief have been unsuccessful.

In his Motion, the Defendant, now through counsel, argues that his sentence and conviction on count one, Armed Burglary, should be vacated because the Florida Supreme Court has in L.B. v. State, 700 So. 2d 370 (Fla. 1997), decided that a common pocketknife can not support a conviction involving possession of a weapon. The Defendant contends that the evidence adduced at trial, pertinent portions of which he has attached to his Motion, establish that the pocketknife he possessed at the time of his arrest meets the definition of the common pocketknife exception in section 790.001(13), Florida Statutes (1999). The Defendant contends that the change announced in L.B. should be applied retroactively based on the Second District Court of Appeal's decision in R.L.S. v. State, 732 So. 2d 39 (Fla. 2d DCA 1999), which the Defendant alleges, applied L.B. retroactively.

The Defendant's Motion is dismissed. The Defendant's reliance upon R.L.S. v. State, 732 So. 2d 39 (Fla. 2d DCA 1999), for determining retroactivity of the rule announced in L.B. v. State, 700 So. 2d 370 (Fla. 1997) is misplaced. As the Florida Supreme Court recently explained in Dixon v. State, 730 So. 2d 265 (Fla. 1999), before a prisoner can rely upon a decision announcing a fundamental change in the law to be applied retroactively, the Florida Supreme Court or United States Supreme Court must announce that its decision is to apply retroactively. Id. at. 268. Further, it is the date of the mandate of the decision announcing retroactivity that is the beginning date for calculating the additional two-year window. Id. at 267. The Supreme Court of Florida, to this court's knowledge, has not determined that its decision in L.B. v. State, 700 So. 2d 370 (Fla. 1997), is of fundamental significance that it should apply retroactively. This court, doubts, based on the limited number of opinions that are given retroactive effect whether the decision in L.B. will be given such an effect. See Glenn v. State, 558 So. 2d 4 (Fla. 1990). Therefore, it is appropriate to dismiss the Defendant's Motion without

prejudice to his right to reassert the issue if, and when, the Florida Supreme Court decides that the decision in L.B. v. State, 700 So. 2d 370 (Fla. 1997) applies retroactively.

Therefore, it is **ORDERED** and **ADJUDGED**:

1. . The motion, file and record conclusively establish that Defendant is entitled to no relief and Defendant's Motion for Postconviction Relief is dismissed.

2. The Defendant is advised that he has 30 days within which to appeal this order.

DONE and **ORDERED** in chambers in Sarasota, Sarasota County, Florida, on this 19 day of October, 1999.

Stephen L. Dakan, Circuit Judge.

Copies furnished by Judge's Office to :

Office of State Attorney.(without attachments)

CERTIFICATE OF SERVICE

I do certify that a copy hereof with attachments has been furnished to R. John Cole, II, Esquire, R. John Cole, P.A., 46 North Washington Boulevard, Suite 24, Sarasota, FL 34236 and Clyde Timothy Bunkley, DOC # 051390, Century Correctional Institution, 400 Tedder Road, Florida 32535 by U.S. Mail, on this 20 day of October, 1999.

Judicial Assistant

copy to Mr. Bunkley

MANDATE

SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the:

District Court of Appeal, Second District

WHEREAS, in that certain cause filed in this Court styled:

CLYDE TIMOTHY BUNKLEY vs. **STATE OF FLORIDA**

Case No.: **SC01-297**

Your Case No.: **2D99-4511**

The attached opinion was rendered on: **11/21/2002**

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS, The Honorable HARRY LEE ANSTEAD, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 12th day of December, 2002.

SUPREME COURT OF THE STATE OF FLORIDA

Clerk of the Supreme Court of Florida

NO. 02-8636

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

CLYDE TIMOTHY BUNKLEY – PETITIONER

VS.

STATE OF FLORIDA – RESPONDENT

PROOF OF SERVICE

I, Clyde Timothy Bunkley, do swear or declare that on this date, January 13, 2003, as required by Supreme Court Rule 29, I have served the enclosed Motion to Proceed *In Forma Pauperis* and Petition For Writ of Certiorari on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the U.S. Mail properly addressed to each of them and with first class postage prepaid.

The name and address of the Respondents is as follows: Office of the Attorney General, 2002 N. Lois Ave., Suite 700, Tampa, Florida 33607-2367.

I DECLARE UNDER PENALTY OF PERJURY that the foregoing is true and correct.

Clyde Timothy Bunkley

NOTARIZED OATH

STATE OF FLORIDA)
)
COUNTY OF POLK)

Before me, the undersigned authority, this day personally appeared Clyde T. Bunkley, who first being duly sworn, says that he is the Petitioner in the above-styled cause, that he has read the foregoing Affidavit (or has had it read to him and understands it) and he has personal knowledge of the facts and matters therein set forth and alleged and that each and all of these facts and matters are true and correct.

Clyde T. Bunkley
(your signature)

SWORN AND SUBSCRIBED TO before me this 13th day of January, 2003.

NOTARY PUBLIC

C. JOYNER
MY COMMISSION # CC 868192
EXPIRES April 24 2004

My Commission Expires

Personally known ___ or produced identification ✓.
Type of identification produced: Florida Department of Corrections Inmate I.D. Card.

IBSR176 (90) — FLORIDA DEPARTMENT OF CORRECTIONS — 12/11/02
INITIAL PAYMENT FOR FILE FEE — 12:14:39
FOR: 12/10/2002 — PAGE 1

DC # : 051390 INMT NAME : BUNKLEY, CLYDE T. CURR BAL : $ 200.15
HOLDS : $ 0.00 LIENS : $ 0.00 SPENDABLE : $ 120.15

DATE RANGE	MONTHLY AVERAGE DEPOSITS	MONTHLY AVERAGE BALANCES
06/13 - 07/12	$ 58.50	$ 92.75
07/13 - 08/11	$ 29.20	$ 55.17
08/12 - 09/10	$ 47.77	$ 58.23
09/11 - 10/10	$ 70.00	$ 43.64
10/11 - 11/09	$ 42.50	$ 20.10
11/10 - 12/09	$ 51.67	$ 17.53

AVERAGE OVER 6 MONTHS DEPOSITS : $ 49.44
BALANCES : $ 47.90

CALCULATED INITIAL PAYMENT : $ 9.89

IBSR140 (74) — FLORIDA DEPARTMENT OF CORRECTIONS — 12/11/02
TRUST FUND ACCOUNT STATEMENT — 11:51:59
FOR: 06/10/2002 - 12/10/2002 — PAGE 1

ACCT NAME: BUNKLEY, CLYDE T. ACCT#: 051390
BED: A3105U TYPE: INMATE TRUST
PO BOX:

BEGINNING BALANCE 06/10/02 $50.23

POSTED DATE	NBR	TYPE	REFERENCE NUMBER	FAC	REMITTER/PAYEE	+/-	AMOUNT	BALANCE
06/10/02	103	CANTEEN SALES	50320020609	000		-	$3.72	$46.51
06/10/02	103	CANTEEN SALES	50320020609	000		-	$0.92	$45.59
06/11/02	099	CANTEEN SALES	50320020610	000		-	$3.30	$42.29
06/12/02	103	CANTEEN SALES	50320020611	000		-	$2.72	$39.57
06/13/02	103	CANTEEN SALES	50320020612	000		-	$4.84	$34.73
06/14/02	103	CANTEEN SALES	50320020613	000		-	$3.40	$31.33
06/15/02	101	CANTEEN SALES	50320020614	000		-	$5.68	$25.65
06/17/02	103	CANTEEN SALES	50320020616	000		-	$5.22	$20.43
06/19/02	518	MONEY ORDER	03009545763	999	MULTON, MARDY	+	$100.00	$120.43
06/20/02	103	CANTEEN SALES	50320020619	000		-	$3.38	$117.05
06/21/02	223	PRIDE PAYROLL	0044933	000	PRIDE (AUTOMATED)	+	$33.98	$151.03
06/22/02	103	CANTEEN SALES	50320020621	000		-	$3.30	$147.73
06/23/02	045	CANTEEN SALES	50320020622	000		-	$14.78	$132.95
06/24/02	081	CANTEEN SALES	50320020623	000		-	$4.67	$128.28
06/25/02	103	CANTEEN SALES	50320020624	000		-	$3.52	$124.76
06/26/02	101	CANTEEN SALES	50320020625	000		-	$7.13	$117.63
06/27/02	103	CANTEEN SALES	50320020626	000		-	$2.42	$115.21
06/29/02	097	CANTEEN SALES	50320020628	000		-	$2.44	$112.77
06/30/02	101	CANTEEN SALES	50320020629	000		-	$6.80	$105.97
06/30/02	101	CANTEEN SALES	50320020629	000		-	$1.94	$104.03
07/01/02	103	CANTEEN SALES	50320020630	000		-	$6.30	$97.73

ACCT NAME: BUNKLEY, CLYDE T. ACCT#: 051390
BED: A3105U TYPE: INMATE TRUST
PO BOX:

POSTED DATE	NBR	TYPE	REFERENCE NUMBER	FAC	REMITTER/PAYEE	+/-	AMOUNT	BALANCE
07/01/02	103	CANTEEN SALES	50320020630	000		-	$1.74	$95.99
07/02/02	103	CANTEEN SALES	50320020701	000		-	$5.93	$90.06
07/04/02	103	CANTEEN SALES	50320020703	000		-	$5.29	$84.77
07/05/02	099	CANTEEN SALES	50320020704	000		-	$1.13	$83.64
07/05/02	136	PRIDE PAYROLL	0046808	000	PRIDE (AUTOMATED)	+	$32.51	$116.15
07/06/02	101	CANTEEN SALES	50320020705	000		-	$3.34	$112.81
07/07/02	101	CANTEEN SALES	50320020706	000		-	$3.24	$109.57
07/07/02	101	CANTEEN SALES	50320020706	000		-	$3.18	$106.39
07/08/02	095	CANTEEN SALES	50320020707	000		-	$9.22	$97.17
07/09/02	101	CANTEEN SALES	50320020708	000		-	$5.40	$91.77
07/10/02	101	CANTEEN SALES	50320020709	000		-	$3.20	$88.57
07/11/02	101	CANTEEN SALES	50320020710	000		-	$2.72	$85.85
07/11/02	101	CANTEEN SALES	50320020710	000		-	$4.11	$81.74
07/13/02	101	CANTEEN SALES	50320020712	000		-	$2.22	$79.52
07/14/02	103	CANTEEN SALES	50320020713	000		-	$3.87	$75.65
07/14/02	103	CANTEEN SALES	50320020713	000		-	$8.16	$67.49
07/15/02	103	CANTEEN SALES	50320020714	000		-	$1.24	$66.25
07/15/02	103	CANTEEN SALES	50320020714	000		-	$1.64	$64.61
07/16/02	101	CANTEEN SALES	50320020715	000		-	$2.64	$61.97
07/18/02	103	CANTEEN SALES	50320020717	000		-	$4.02	$57.95
07/19/02	101	CANTEEN SALES	50320020718	000		-	$2.83	$55.12
07/19/02	218	PRIDE PAYROLL	0048682	000	PRIDE (AUTOMATED)	+	$28.13	$83.25
07/20/02	103	CANTEEN SALES	50320020719	000		-	$2.00	$81.25

ACCT NAME: BUNKLEY, CLYDE T. ACCT#: 051390
BED: A3105U TYPE: INMATE TRUST
PO BOX:

POSTED DATE	NBR	TYPE	REFERENCE NUMBER	FAC	REMITTER/PAYEE	+/-	AMOUNT	BALANCE
07/20/02	103	CANTEEN SALES	50320020719	000		-	$6.00	$75.25
07/21/02	101	CANTEEN SALES	50320020720	000		-	$4.08	$71.17
07/22/02	101	CANTEEN SALES	50320020721	000		-	$2.19	$68.98
07/23/02	101	CANTEEN SALES	50320020722	000		-	$3.24	$65.74
07/24/02	101	CANTEEN SALES	50320020723	000		-	$5.05	$60.69
07/26/02	103	CANTEEN SALES	50320020725	000		-	$2.94	$57.75
07/28/02	103	CANTEEN SALES	50320020727	000		-	$5.36	$52.39
07/29/02	097	CANTEEN SALES	50320020728	000		-	$4.01	$48.38
07/29/02	097	CANTEEN SALES	50320020728	000		-	$1.06	$47.32
07/30/02	089	CANTEEN SALES	50320020729	000		-	$4.47	$42.85
07/31/02	087	CANTEEN SALES	50320020730	000		-	$2.65	$40.20
08/01/02	101	CANTEEN SALES	50320020731	000		-	$4.42	$35.78
08/02/02	099	CANTEEN SALES	50320020801	000		-	$1.16	$34.62
08/02/02	238	PRIDE PAYROLL	0050557	000	PRIDE (AUTOMATED)	+	$30.26	$64.88
08/03/02	101	CANTEEN SALES	50320020802	000		-	$6.09	$58.79
08/04/02	105	CANTEEN SALES	50320020803	000		-	$3.34	$55.45
08/04/02	105	CANTEEN SALES	50320020803	000		-	$1.02	$54.43
08/05/02	101	CANTEEN SALES	50320020804	000		-	$5.02	$49.41
08/06/02	101	CANTEEN SALES	50320020805	000		-	$3.54	$45.87
08/07/02	101	CANTEEN SALES	50320020806	000		-	$6.16	$39.71
08/07/02	101	CANTEEN SALES	50320020806	000		-	$1.76	$37.95
08/08/02	103	CANTEEN SALES	50320020807	000		-	$1.95	$36.00
08/09/02	103	CANTEEN SALES	50320020808	000		-	$1.94	$34.06

ACCT NAME: BUNKLEY, CLYDE T. ACCT#: 051390
BED: A3105U TYPE: INMATE TRUST
PO BOX:

POSTED DATE	NBR	TYPE	REFERENCE NUMBER	FAC	REMITTER/PAYEE	+/-	AMOUNT	BALANCE
08/10/02	101	CANTEEN SALES	50320020809	000		-	$3.02	$31.04
08/11/02	103	CANTEEN SALES	50320020810	000		-	$1.56	$29.48
08/12/02	097	CANTEEN SALES	50320020811	000		-	$3.44	$26.04
08/13/02	101	CANTEEN SALES	50320020812	000		-	$5.28	$20.76
08/14/02	103	CANTEEN SALES	50320020813	000		-	$3.69	$17.07
08/15/02	103	CANTEEN SALES	50320020814	000		-	$1.48	$15.59
08/16/02	173	PRIDE PAYROLL	0052364	000	PRIDE (AUTOMATED)	+	$29.93	$45.52
08/17/02	103	CANTEEN SALES	50320020816	000		-	$7.48	$38.04
08/17/02	103	CANTEEN SALES	50320020816	000		-	$1.38	$36.66
08/18/02	105	CANTEEN SALES	50320020817	000		-	$3.08	$33.58
08/18/02	105	CANTEEN SALES	50320020817	000		-	$1.16	$32.42
08/19/02	103	CANTEEN SALES	50320020818	000		-	$1.60	$30.82
08/19/02	103	CANTEEN SALES	50320020818	000		-	$2.86	$27.96
08/20/02	103	CANTEEN SALES	50320020819	000		-	$2.12	$25.84
08/20/02	103	CANTEEN SALES	50320020819	000		-	$1.82	$24.02
08/21/02	103	CANTEEN SALES	50320020820	000		-	$2.80	$21.22
08/21/02	103	CANTEEN SALES	50320020820	000		-	$0.90	$20.32
08/22/02	103	CANTEEN SALES	50320020821	000		-	$1.70	$18.62
08/22/02	516	MONEY ORDER	063471921126	999	UNKNOWN	+	$100.00	$118.62
08/23/02	103	CANTEEN SALES	50320020822	000		-	$2.24	$116.38
08/23/02	103	CANTEEN SALES	50320020822	000		-	$0.58	$115.80
08/24/02	101	CANTEEN SALES	50320020823	000		-	$2.64	$113.16
08/24/02	101	CANTEEN SALES	50320020823	000		-	$1.04	$112.12

ACCT NAME: BUNKLEY, CLYDE T. ACCT#: 051390
BED: A3105U TYPE: INMATE TRUST
PO BOX:

POSTED DATE	NBR	TYPE	REFERENCE NUMBER	FAC	REMITTER/PAYEE	+/-	AMOUNT	BALANCE
08/25/02	107	CANTEEN SALES	50320020824	000		-	$9.98	$102.14
08/26/02	103	CANTEEN SALES	50320020825	000		-	$2.48	$99.66
08/27/02	103	CANTEEN SALES	50320020826	000		-	$8.09	$91.57
08/27/02	103	CANTEEN SALES	50320020826	000		-	$2.06	$89.51
08/28/02	101	CANTEEN SALES	50320020827	000		-	$4.10	$85.41
08/28/02	101	CANTEEN SALES	50320020827	000		-	$5.26	$80.15
08/29/02	103	CANTEEN SALES	50320020828	000		-	$1.90	$78.25
08/30/02	103	CANTEEN SALES	50320020829	000		-	$3.26	$74.99
08/30/02	153	PRIDE PAYROLL	0053973	000	PRIDE (AUTOMATED)	+	$13.39	$88.38
08/31/02	099	CANTEEN SALES	50320020830	000		-	$4.22	$84.16
09/01/02	103	CANTEEN SALES	50320020831	000		-	$7.48	$76.68
09/02/02	103	CANTEEN SALES	50320020901	000		-	$1.62	$75.06
09/03/02	103	CANTEEN SALES	50320020902	000		-	$7.27	$67.79
09/04/02	099	CANTEEN SALES	50320020903	000		-	$5.46	$62.33
09/04/02	099	CANTEEN SALES	50320020903	000		-	$5.46	$56.87
09/04/02	099	CANTEEN SALES	50320020903	000		-	$0.92	$55.95
09/05/02	121	CANTEEN SALES	50320020904	000		-	$5.10	$50.85
09/06/02	101	CANTEEN SALES	50320020905	000		-	$5.23	$45.62
09/07/02	099	CANTEEN SALES	50320020906	000		-	$6.44	$39.18
09/09/02	091	CANTEEN SALES	50320020908	000		-	$6.60	$32.58
09/09/02	091	CANTEEN SALES	50320020908	000		-	$1.16	$31.42
09/10/02	101	CANTEEN SALES	50320020909	000		-	$1.44	$29.98
09/11/02	101	CANTEEN SALES	50320020910	000		-	$2.16	$27.82

ACCT NAME: BUNKLEY, CLYDE T. ACCT#: 051390
BED: A3105U TYPE: INMATE TRUST
PO BOX:

POSTED DATE	NBR	TYPE	REFERENCE NUMBER	FAC	REMITTER/PAYEE	+/-	AMOUNT	BALANCE
09/12/02	099	CANTEEN SALES	50320020911	000		-	$2.98	$24.84
09/13/02	101	CANTEEN SALES	50320020912	000		-	$3.20	$21.64
09/13/02	101	CANTEEN SALES	50320020912	000		-	$2.13	$19.51
09/13/02	502	MONEY ORDER	063141141075	999	LEMASTERS, DORIS	+	$70.00	$89.51
09/14/02	097	CANTEEN SALES	50320020913	000		-	$2.86	$86.65
09/14/02	097	CANTEEN SALES	50320020913	000		-	$1.44	$85.21
09/15/02	101	CANTEEN SALES	50320020914	000		-	$4.05	$81.16
09/16/02	099	CANTEEN SALES	50320020915	000		-	$3.57	$77.59
09/18/02	101	CANTEEN SALES	50320020917	000		-	$5.02	$72.57
09/19/02	101	CANTEEN SALES	50320020918	000		-	$2.12	$70.45
09/19/02	101	CANTEEN SALES	50320020918	000		-	$2.85	$67.60
09/20/02	099	CANTEEN SALES	50320020919	000		-	$2.94	$64.66
09/21/02	099	CANTEEN SALES	50320020920	000		-	$1.84	$62.82
09/22/02	107	CANTEEN SALES	50320020921	000		-	$4.65	$58.17
09/23/02	101	CANTEEN SALES	50320020922	000		-	$6.77	$51.40
09/24/02	101	CANTEEN SALES	50320020923	000		-	$2.22	$49.18
09/25/02	099	CANTEEN SALES	50320020924	000		-	$2.70	$46.48
09/26/02	101	CANTEEN SALES	50320020925	000		-	$3.47	$43.01
09/27/02	101	CANTEEN SALES	50320020926	000		-	$1.28	$41.73
09/28/02	099	CANTEEN SALES	50320020927	000		-	$1.92	$39.81
09/29/02	105	CANTEEN SALES	50320020928	000		-	$2.02	$37.79
09/29/02	105	CANTEEN SALES	50320020928	000		-	$1.46	$36.33
09/30/02	101	CANTEEN SALES	50320020929	000		-	$1.62	$34.71

ACCT NAME: BUNKLEY, CLYDE T. ACCT#: 051390
BED: A3105U TYPE: INMATE TRUST
PO BOX:

POSTED DATE	NBR	TYPE	REFERENCE NUMBER	FAC	REMITTER/PAYEE	+/-	AMOUNT	BALANCE
10/01/02	101	CANTEEN SALES	50320020930	000		-	$5.22	$29.49
10/02/02	099	CANTEEN SALES	50320021001	000		-	$2.65	$26.84
10/03/02	099	CANTEEN SALES	50320021002	000		-	$2.42	$24.42
10/04/02	101	CANTEEN SALES	50320021003	000		-	$2.62	$21.80
10/05/02	101	CANTEEN SALES	50320021004	000		-	$2.70	$19.10
10/06/02	105	CANTEEN SALES	50320021005	000		-	$1.82	$17.28
10/06/02	105	CANTEEN SALES	50320021005	000		-	$1.24	$16.04
10/08/02	101	CANTEEN SALES	50320021007	000		-	$3.18	$12.86
10/09/02	099	CANTEEN SALES	50320021008	000		-	$3.38	$9.48
10/09/02	099	CANTEEN SALES	50320021008	000		-	$2.83	$6.65
10/10/02	101	CANTEEN SALES	50320021009	000		-	$2.02	$4.63
10/10/02	101	CANTEEN SALES	50320021009	000		-	$0.89	$3.74
10/11/02	101	CANTEEN SALES	50320021010	000		-	$1.26	$2.48
10/12/02	101	CANTEEN SALES	50320021011	000		-	$2.02	$0.46
10/24/02	528	MONEY ORDER	065544794700	999	REGAN, SANDI	+	$50.00	$50.46
10/25/02	101	CANTEEN SALES	50320021024	000		-	$0.34	$50.12
10/27/02	105	CANTEEN SALES	50320021026	000		-	$28.22	$21.90
10/28/02	101	CANTEEN SALES	50320021027	000		-	$2.80	$19.10
10/29/02	099	CANTEEN SALES	50320021028	000		-	$2.64	$16.46
10/29/02	099	CANTEEN SALES	50320021028	000		-	$1.16	$15.30
10/29/02	531	MONEY ORDER	060243321354	999	BUNKLEY, BOBBY	+	$35.00	$50.30
10/30/02	101	CANTEEN SALES	50320021029	000		-	$2.44	$47.86
10/31/02	101	CANTEEN SALES	50320021030	000		-	$2.50	$45.36

ACCT NAME: BUNKLEY, CLYDE T.
BED: A3105U
PO BOX:

ACCT#: 051390
TYPE: INMATE TRUST

POSTED DATE	NBR	TYPE	REFERENCE NUMBER	FAC	REMITTER/PAYEE	+/-	AMOUNT	BALANCE
11/01/02	101	CANTEEN SALES	50320021031	000		-	$5.12	$40.24
11/02/02	097	CANTEEN SALES	50320021101	000		-	$2.86	$37.38
11/03/02	101	CANTEEN SALES	50320021102	000		-	$3.38	$34.00
11/04/02	101	CANTEEN SALES	50320021103	000		-	$2.54	$31.46
11/05/02	101	CANTEEN SALES	50320021104	000		-	$2.69	$28.77
11/06/02	099	CANTEEN SALES	50320021105	000		-	$4.72	$24.05
11/08/02	101	CANTEEN SALES	50320021107	000		-	$2.19	$21.86
11/09/02	101	CANTEEN SALES	50320021108	000		-	$3.87	$17.99
11/11/02	101	CANTEEN SALES	50320021110	000		-	$4.39	$13.60
11/12/02	101	CANTEEN SALES	50320021111	000		-	$2.02	$11.58
11/13/02	101	CANTEEN SALES	50320021112	000		-	$2.26	$9.32
11/14/02	101	CANTEEN SALES	50320021113	000		-	$3.04	$6.28
11/15/02	101	CANTEEN SALES	50320021114	000		-	$2.02	$4.26
11/15/02	502	MONEY ORDER	063717518193	999	LEMASTER, DORIS	+	$20.00	$24.26
11/16/02	097	CANTEEN SALES	50320021115	000		-	$1.52	$22.74
11/19/02	099	CANTEEN SALES	50320021118	000		-	$2.03	$20.71
11/20/02	099	CANTEEN SALES	50320021119	000		-	$3.39	$17.32
11/21/02	101	CANTEEN SALES	50320021120	000		-	$3.14	$14.18
11/22/02	101	CANTEEN SALES	50320021121	000		-	$5.89	$8.29
11/24/02	101	CANTEEN SALES	50320021123	000		-	$3.14	$5.15
11/25/02	101	CANTEEN SALES	50320021124	000		-	$2.26	$2.89
11/27/02	101	CANTEEN SALES	50320021126	000		-	$2.48	$0.41
11/27/02	508	MONEY ORDER	065544798426	999	UNKNOWN	+	$35.00	$35.41

ACCT NAME: BUNKLEY, CLYDE T.
BED: A3105U
PO BOX:

ACCT#: 051390
TYPE: INMATE TRUST

POSTED DATE	NBR	TYPE	REFERENCE NUMBER	FAC	REMITTER/PAYEE	+/-	AMOUNT	BALANCE
11/30/02	099	CANTEEN SALES	50320021129	000		-	$6.22	$29.19
11/30/02	099	CANTEEN SALES	50320021129	000		-	$2.80	$26.39
12/01/02	101	CANTEEN SALES	50320021130	000		-	$5.34	$21.05
12/02/02	101	CANTEEN SALES	50320021201	000		-	$4.40	$16.65
12/03/02	101	CANTEEN SALES	50320021202	000		-	$4.84	$11.81
12/04/02	099	CANTEEN SALES	50320021203	000		-	$6.30	$5.51
12/05/02	099	CANTEEN SALES	50320021204	000		-	$2.26	$3.25
12/06/02	101	CANTEEN SALES	50320021205	000		-	$0.92	$2.33
12/07/02	099	CANTEEN SALES	50320021206	000		-	$0.92	$1.41
12/08/02	101	CANTEEN SALES	50320021207	000		-	$1.26	$0.15
12/09/02	508	MONEY ORDER	063717519957	999	LEMASTERS, DORIS	+	$100.00	$100.15
12/10/02	512	MONEY ORDER	065495720913	999	UNKNOWN	+	$100.00	$200.15

ENDING BALANCE 12/10/02 $200.15

ORIGINAL

Supreme Court, U.S.
FILED
MAR 21 2003
CLERK

NO. 02-8636

IN THE SUPREME COURT OF THE UNITED STATES

CLYDE TIMOTHY BUNKLEY, *Petitioner*

v.

STATE OF FLORIDA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT J. KRAUSS
Counsel of Record
Chief-Assistant Attorney General
Bureau Chief, Tampa Criminal Appeals
Florida Bar Number 0238538
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813)287-7900
Fax (813)281-5500

RONALD NAPOLITANO
Assistant Attorney General
Florida Bar Number 0130175
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813)287-7900
Fax (813)281-5500

COUNSEL FOR RESPONDENT

QUESTION PRESENTED

As stated by Petitioner:

> WHETHER THE PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE STATE OF FLORIDA'S REFUSAL TO APPLY THE RECENTLY INTERPRETED FLORIDA SUPREME COURT DEFINITION REGARDING THE "COMMON POCKET KNIFE" EXCLUSION TO THE WEAPONS STATUTE, IN DIRECT CONTRADICTION WITH THE UNITED STATES SUPREME COURT'S RECENT DECISION IN *FIORE V. WHITE*, 531 U.S. 225 (2001)

Respondent would restate the question as follows:

> WHETHER THE COURT SHOULD REVIEW THE DECISION OF THE FLORIDA SUPREME COURT, WHICH CONCLUDED THAT PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THAT COURT'S 1997 RULING DETERMINING THAT, THE "COMMON POCKET KNIFE EXCEPTION" TO A FLORIDA WEAPONS STATUTE, DID NOT APPLY TO PETITIONER'S 1987 CONVICTION, ALLEGEDLY IN CONTRADICTION WITH *FIORE V. WHITE*, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001).

TABLE OF CONTENTS

QUESTION PRESENTED ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE DENIED 4

(1) THE INTERPRETATION OF THE STATE CRIMINAL LAW IN QUESTION WAS AN EVOLUTIONARY REFINEMENT IN THE LAW WHICH DID NOT VIOLATE DUE PROCESS OF LAW AND IS NOT REQUIRED TO BE APPLIED RETROACTIVELY. 4

(2) THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S HOLDING IN *FIORE V. WHITE*, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001) BECAUSE IT WAS NOT A CLARIFICATION OF THE LAW AS TO WHAT CONSTITUTED "COMMON" POCKETKNIFE AT THE DATE OF PETITIONER'S CONVICTION. 11

(3) THE DECISION OF THE FLORIDA SUPREME COURT IN *BUNKLEY* IS NOT OF COMPELLING IMPORTANCE TO JUSTIFY REVIEW BY THIS COURT. . 15

(4) THE DECISION OF THE FLORIDA SUPREME COURT WAS CORRECT. . 16

CONCLUSION 17

CERTIFICATE OF SERVICE 18

TABLE OF CITED AUTHORITIES

CASES

Bunkley v. State,
833 So. 2d 739 (Fla. 2002) 1-5, 8-11, 13-16

Estelle v. McGuire,
502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) 4

Fiore v. White,
149 F.3d 221 (C.A.3 (Pa.) 1998), *reversed on other grounds*, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001) 10

Fiore v. White,
531 U.S. 225, 121 S.Ct. 712,
148 L.Ed.2d 629 (2001) 3, 4, 11-16

J.D.L.R. v. State,
701 So. 2d 626 (Fla. 3d DCA 1997) 8, 10, 16

L.B. v. State,
700 So. 2d 370 (Fla. 1997) 5, 6, 8, 13, 15, 16

Layne & Bowler Corp. v. Western Well Works,
261 U.S. 387, 43 S.Ct. 422, 67 L.Ed.2d 712 (1923) 16

Rice v. Sioux City Memorial Park Cemetery,
349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955) 15

State v. Family Bank of Hallandale,
623 So. 2d 474 (Fla. 1993) 6, 14

State v. Klayman,
27 Fla. L. Weekly S951 at S952,
835 So. 2d 248 (Fla. Nov. 14, 2002) 9, 14

FLORIDA STATUTES

F.S. 790.001(13), Fla. Stat. 5

F.S. 790.0013, Fla. Stat. (1985) 14

F.S. 810.02(1)(b), Fla. Stat. (1985) 5

UNITED STATES CONSTITUTION

Title 28, United States Code, Section 1257(a) 2

OTHER AUTHORITY

Rule 10 Rules of the Supreme Court 2, 15

NO. 02-8636

IN THE SUPREME COURT OF THE UNITED STATES

CLYDE TIMOTHY BUNKLEY, *Petitioner*
v.
STATE OF FLORIDA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, State of Florida, by and through the undersigned assistant attorneys general, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the decision of the Florida Supreme Court in this case.

OPINION BELOW

The opinion of the Florida Supreme Court (App, *infra*, A) is reported at *Bunkley v. State*, 833 So. 2d 739 (Fla. 2002)

JURISDICTION

The Florida Supreme Court rendered its decision on November 21, 2002 and a mandate was entered on December 21, 2002.

Petitioner asserts a deprivation of the rights guaranteed by the Constitution of the United States. Title 28, United States Code, Section 1257(a) and Rule 10.1(c) Rules of the Supreme Court confer certiorari jurisdiction in this Court to review such claims.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent, State of Florida, accepts as accurate Petitioner's statement regarding the applicable provisions of law involved.

STATEMENT OF THE CASE

The relevant facts of the case were described in the Florida Supreme Court's opinion in *Bunkley v. State*, 833 So.2d 739, 740-741 (Fla. 2002).

In the trial transcript, as attached to petitioner's motion for post-conviction relief, the knife in question, which had been admitted into evidence and was "published" to the jury, was described as follows by the arresting police officer:

> Okay. It's very simple. The blade opens like this (indicating). This is the sharp side and to close the blade -- it's a locking knife. Once it opens, unless you push down hard on this button, the blade will not close.
>
> It's a locked blade, which makes it a dangerous weapon for the simple fact that an average pocketknife, it you stick something with it and you're not very good at what you do, the blade will close. The pocket knife has that safety feature, that it will close. This blade will not close unless you push down very hard on this spring.

(CR349-50)

Petitioner testified at his trial regarding the nature of the knife:

> Q. And I'm not very familiar, but is a roofing shingle a tough piece of material to cut through?
>
> A. Yes, sir, it is.
>
> Q. And do you need a pretty good pocketknife to be able to cut through those materials?
>
> A. That was my purpose for having the knife. It's a little bit larger than a natural pocketknife, and that was the reason for it.

(CR438)

The question of whether petitioner's conviction violates due process based upon the decision in *Fiore v. White*, 531 U.S. 225 (2001), was not raised by the parties at any time. Instead, it was "mentioned" for the first time by Justice Pariente of the Florida Supreme Court at the time of oral argument and discussed by the Florida Supreme Court in their written opinion. The majority of the Florida Supreme held that *Fiore* did not apply in the present case. *Bunkley, supra* at 744 fn.12. The majority also held that there was no violation of due process reasoning:

> The Legislature, at the turn of the century, ceded discretion to the courts by employing the phrases "dangerous weapon" and "common pocketknife" in the burglary and weapons statute, and these phrases clearly required judicial construction in order to provide a meaningful basis for imposing sanctions. This Court's decision in *L.B.*, which was issued in 1997, was the culmination

> of a century-long evolutionary process. Although some courts during that period may have interpreted "common pocketknife" contrary to the holding in *L.B.*, each court nevertheless sought to comply with the legislative intent and to rule in harmony with the law at it was interpreted at that point in time. A key consideration is that *none of the courts attempted to impose criminal sanctions without statutory authority* -- i.e., none ruled in contravention of legislative intent. Thus, none of the convictions imposed pursuant to section 790.001(13) violated the Due Process Clause in this regard.

Bunkley, supra at 745.

REASONS WHY THE PETITION SHOULD BE DENIED

(1) THE INTERPRETATION OF THE STATE CRIMINAL LAW IN QUESTION WAS AN EVOLUTIONARY REFINEMENT IN THE LAW WHICH DID NOT VIOLATE DUE PROCESS OF LAW AND IS NOT REQUIRED TO BE APPLIED RETROACTIVELY.

In *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) this Court held that it is not the province of federal courts to re-examine state-court determinations on state law questions. Rather, the federal courts are limited to deciding whether a certain conviction violates the Constitution, laws, or treaties of the United States. This Court stated in *Fiore v. White*, 531 U.S. 225, 228-229, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001) that the Due Process Clause of the Fourteenth Amendment forbids a state to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt.

Bunkley was convicted of armed burglary because he had a

pocketknife with a blade length of 2½ to 3 inches in his trousers at the time he broke into a closed, unoccupied Western Sizzlin Restaurant. *Bunkley v. State*, 833 So.2d 739, 741 (Fla. 2002). In 1987, when Bunkley committed his crime, Florida Statute 810.02(1)(b) (1985) provided that if a defendant is armed with a dangerous weapon at the time of the commission of a burglary he is subject to imprisonment by a term of years not exceeding life.

In 1987, the law did not exempt or exclude from the statute, a pocketknife with a blade four inches in length or less as being a "common pocketknife". Therefore the fact that the pocketknife in question had a blade of less then four inches did not include that knife within the statutory exception to the definition of "weapon" as found in section 790.001(13). In fact, neither the statutes nor case law defined the term "common pocketknife"; rather what was constituted a "common" pocketknife was left to the jury to determine and this did not make the term unconstitutionally vague.

As the Florida Supreme Court pointed out in *L.B. v. State*, 700 So. 2d 370, at 372 (Fla. 1997):

> ...We believe that the term "common pocketknife" as contained in the statute, does provide persons of ordinary intelligence with fair notice as to what constitutes forbidden conduct.
>
> The legislature's failure to define the term "common pocketknife" in section 790.001(13) does not render that term unconstitutionally vague....Moreover, a court may refer to a dictionary to ascertain the plain and ordinary meaning which the

legislature intended to ascribe to a term. (citation omitted)

To that end, we note that Webster's defines "common" as: "known to the community; occurring or appearing frequently esp. in the ordinary course of events; of, relating to, or typical of the many rather than the few." Webster's defines "pocketknife" as "a knife with a blade folding into the handle to fit it for being carried in the pocket." From these definitions, we can infer that the legislature's intended definition of "common pocketknife" was: "A type of knife occurring frequently in the community which has a blade that folds into the handle and that can be carried in one's pocket." We believe that in the vast majority of cases, it will be evident to citizens and fact-finders whether one's pocketknife is a "common" pocketknife under any intended definition of that term. We need not be concerned with odd scenarios construing smaller but more expensive knives as "uncommon." As the United States Supreme Court has observed, "[s]uch straining to inject doubt as to the meaning of words where no doubt would be felt by the normal reader is not required by the 'void for vagueness' doctrine, and we will not indulge in it." *United States v. Powell*, 423 U.S. 87, 93, 96 S.Ct. 316, 320, 46 L.Ed.2d 228 (1975)

L.B., supra at 372. (bold emphasis added)

It was only 1997, ten years after petitioner's conviction was final, that the Florida Supreme Court, relying in part on a Florida Attorney General 1951 opinion, concluded that a pocketknife with a blade of four inches in length or less was a "common pocket knife". *L.B. v. State, supra.*[1]

---

[1] Prior to that time, the attorney general's opinion, though persuasive, was not binding on the courts. *State v. Family Bank of Hallandale*, 623 So. 2d 474, at 478 (Fla. 1993) ("Although an opinion of the Attorney General is not binding on a court, it is

At the time of the petitioner's conviction in 1987, evidence and testimony produced at the petitioner's 1987 trial indicated that the knife in question was not a "common" pocketknife." The trial transcript, as attached to petitioner's motion for post-conviction relief, reveals that the knife in question, which had been admitted into evidence and was "published" to the jury, was described as follows by the arresting police officer:

> Okay. It's very simple. The blade opens like this (indicating). This is the sharp side and to close the blade -- it's a locking knife. Once it opens, unless you push down hard on this button, the blade will not close.
>
> It's a locked blade, which makes it a dangerous weapon for the simple fact that an average pocketknife, it you stick something with it and you're not very good at what you do, the blade will close. The pocket knife has that safety feature, that it will close. This blade will not close unless you push down very hard on this spring.

(CR349-50)

Petitioner testified at his trial regarding the nature of the knife:

> Q. And I'm not very familiar, but is a roofing shingle a tough piece of material to cut through?
>
> A. Yes, sir, it is.
>
> Q. And do you need a pretty good pocketknife to be able to cut through those materials?

---

entitled to careful consideration and generally should be regarded as highly persuasive. (citation omitted).").

> A. That was my purpose for having the knife. It's a little bit larger than a natural pocketknife, and that was the reason for it.

(CR438)

In the instant case, the Florida Supreme Court ruled that that *L.B. v. State, supra*, "was an 'evolutionary refinement' in the law, i.e., it was a conventional change that 'affords new or different guidelines' for the court's in applying the law." *Bunkley, supra* at 745.

Even after the decision in *Bunkley*, Third District Court of Appeal, in *J.D.L.R. v. State*, 701 So. 2d 626 (Fla. 3d DCA 1997) ruled that the fact that a pocketknife has a blade length less that four inches in length does not mean that it is a "common" pocketknife in all cases but that you must consider other characteristics of the knife:

> We agree with the trial judge that J.D.L.R's knife does not fall within the Supreme Court's definition of "common pocketknife"--"a type of knife occurring frequently in the community which has a blade that folds into the handle and can be carried in one's pocket." *Id.* It is, indeed, a "pocketknife", but it is not a "common" pocketknife. As the trial judge pointed out, its distinctive features are not those characteristic of the typical, ordinary, frequently-occurring pocketknife, but rather characteristic of a weapon.

J.D.L.R., id. at 627.

The decision in *Bunkley*, although it is a new interpretation of a state criminal statute, is not entitled to retroactive application because it did not "interpret" or "clarify" the

definition of the term "common pocketknife" as it existed at the time of the petitioner's conviction. As the Florida Supreme Court explained in *State v. Klayman*, 27 Fla. L. Weekly S951 at S952, 835 So. 2d 248 (Fla. Nov. 14, 2002):

> It thus is this clear under *Fiore* that, if a decision of a state's highest court is a clarification in the law, due process considerations dictate that the decision be applied in all cases, whether pending or final, **that were decided under the same version (i.e. the clarified version) of applicable law.** Otherwise, courts may be imposing criminal sanctions for conduct that was not proscribed by the state legislature.

As the court explained in *Bunkley, supra* at 745:

> ...This Court's decision in *L.B.*, which was issued in 1997, was the culmination of a century-long evolutionary process. Although some courts during that period may have interpreted "common pocketknife" contrary to the holding in *L.B.*, each court nevertheless sought to comply with legislative intent and to rule in harmony with the law as it was interpreted at that point in time. A key consideration is that *none of the courts attempted to impose criminal sanctions without statutory authority*--i.e., none ruled in contravention of legislative intent. Thus, none of the convictions imposed pursuant to section 790.001(13) violated the Due Process Clause in this regard.

Furthermore, as explained earlier, even though pocketknife has a blade of length that is less than four inches does not mean that it is a "common" pocketknife but that the jury can consider other characteristics which are not those of an ordinary, frequently-

occurring pocketknife.[2]

The decision in *Bunkley* is strictly a state court determination of a state law question. As the Court of Appeals for the Third Circuit stated in *Fiore v. White*, 149 F.3d 221, 224-225 (C.A.3 (Pa.) 1998), *reversed on other grounds*, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001):

> ...[s]tate courts are under no constitutional obligation to apply their own criminal decisions retroactively. *Wainwright v. Stone*, 414 U.S. 21, 23-24, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973). Thus, just as the Supreme Court has fashioned retroactivity rules for the federal courts based on principles of judicial integrity, fairness, and finality, *see Teague v. Lane*, 489 U.S. 288, 304-310, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), the state courts are free to adopt their own retroactivity rules after independent consideration of these and other relevant principles.

Accordingly, this Court should decline to exercise its certiorari jurisdiction in this case because the matter is strictly an issue of interpretation of state law that does not involve any due process violation.

---

[2] *See J.D.L.R., supra,* and, as citations from the trial record indicate, there was testimony that the knife in question was not a "common" pocketknife.

(2) THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S HOLDING IN *FIORE V. WHITE*, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001) BECAUSE IT WAS NOT A CLARIFICATION OF THE LAW AS TO WHAT CONSTITUTED "COMMON" POCKETKNIFE AT THE DATE OF PETITIONER'S CONVICTION.

There is no conflict between the Florida Supreme Court's opinion in *Bunkley, supra,* and this Court's opinion in *Fiore, supra,* because the cases are clearly distinguishable factually and legally. Fiore was charged with violating a Pennsylvania statute prohibiting the operation of a hazardous waste facility without a permit. *Fiore*, 531 U.S. at 226. The prosecution conceded that Fiore had a permit, but argued that he had deviated so dramatically from the permit's terms that he nonetheless violated the statute; his convictions were affirmed on appeal and the Pennsylvania Supreme Court declined to review. *Fiore*, 531 U.S. at 227. The state supreme court thereafter reviewed the conviction of Fiore's co-defendant, David Scarpone. As this Court pointed out:

> The Supreme court reversed Scarpone's conviction on the ground that the statute meant what it said: The statute made it unlawful to operate a facility *without* a permit; one who deviated from his permit's terms was not a person *without a permit;* hence, a person who deviated from his permit's terms did not violate the statute.

Fiore, 531 U.S. at 227.

Fiore sought federal habeas corpus relief and the Third Circuit ruled that the state supreme court had announced a new rule of law, inapplicable to Fiore's already final conviction, and that

the state courts were under no federal constitutional obligation to apply their decisions retroactively. This Court granted certiorari to determine whether Fiore's conviction violated due process.

This Court was uncertain whether the Pennsylvania Supreme Court's decision represented a change in state law and asked that court if the interpretation of the state law set forth in the co-defendant's Scarpone's case "state[s] the correct interpretation of the law in Pennsylvania at the date Fiore's conviction became final." *Fiore*, 531 U.S. at 228 (emphasis added). After the state supreme court advised this Court that its decision in Scarpone's case did not announce a new rule of law but "merely clarified the plain language of the statute" and "furnishes the proper statement of the law at the date of Fiore's conviction", *Fiore*, 531 U.S. at 228 (emphasis added), this Court ruled that because Scarpone's case was not new law, Fiore's case presented no issue of retroactivity and the question was simply "whether Pennsylvania can, consistently with the Federal Due Process Clause, convict Fiore for conduct that its criminal statute, as interpreted, does not prohibit." *Fiore*, 531 U.S. 228.

This Court then reasoned :

> This Court's precedents make clear that Fiore's conviction and continued incarceration on this charge violate due process. We have held that the Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt. (citations omitted). In this case,

> failure to possess a permit is a basic element of the crime of which Fiore was convicted... And the parties agree that the Commonwealth presented no evidence whatsoever to prove that basic element. To the contrary, the Commonwealth, conceding that Fiore did possess a permit...necessarily concedes that it did not prove he failed to possess one.

Fiore, 531 U.S. at 228-229

Fiore was entitled to due process relief because even though the statute in question only forbad operating a hazardous waste facility without a permit, he was convicted even though he had a permit based upon the argument that he had deviated so dramatically from the permit's terms that this constituted a violation of the statute. Because the Pennsylvania Supreme Court ruled that the statute meant what it said, that the statute only made it unlawful to operate a facility without a permit and that one who deviates from the permit's terms is not a person without a permit and hence such a person did not violate the statute, Fiore was denied due process because the state failed to prove that he did not have a permit and yet still convicted him.

In the instant case, the Florida Supreme Court ruled that that *L.B. v. State*, 700 So. 2d 370 (Fla. 1997) "was an 'evolutionary refinement' in the law, i.e., it was a conventional change that 'affords new or different guidelines' for the court's in applying the law." *Bunkley, supra* at 745. The court in *L.B.* was not, to paraphrase the language used by this court in *Fiore*, "clarifying the common pocketknife exception to the plain language

of F.S. 790.0013, Fla. Stat. (1985) as it existed at the time of Bunkley's conviction." See: *State v. Klayman*, 27 Fla. L. Weekly S951, at S952, 835 So. 2d 248 (Fla. Nov. 14, 2002).

Unlike *Fiore* where the state court convicted the defendant without statutory authority, at the time of petitioner's 1987 conviction, **there was no blade length limit determining what constituted a "common" pocketknife**; therefore, finding the petitioner guilty of armed burglary with a knife that had a blade length less than four inches did not result in a conviction without legislative authority. As the court pointed in *Bunkley*, *supra* at 745:

> The Legislature, at the turn of the century, ceded discretion to the courts by employing the phrases "dangerous weapon" and "common pocketknife" in the burglary and weapons statute, and these phrases clearly required judicial construction in order to provide a meaningful basis for imposing sanctions. This Court's decision in *L.B.*, which was issued in 1997, was the culmination of a century-long evolutionary process. Although some courts during that period may have interpreted "common pocketknife" contrary to the holding in *L.B.*, each court nevertheless sought to comply with the legislative intent and to rule in harmony with the law at it was interpreted at that point in time. A key consideration is that *none of the courts attempted to impose criminal sanctions without statutory authority* -- i.e., none ruled in contravention of legislative intent. Thus, none of the convictions imposed pursuant to section 790.001(13) violated the Due Process Clause in this regard.

Even today the fact that the blade of the pocketknife in

question was less than four inches in length does not automatically mean that it must be found to be a "common" pocketknife even after the decision in *L.B.*[3]

Since there is no conflict between the decision of the Florida Supreme Court in *Bunkley* and this Court in *Fiore*, this Court should deny the petition for writ of certiorari.

(3) THE DECISION OF THE FLORIDA SUPREME COURT IN *BUNKLEY* IS NOT OF COMPELLING IMPORTANCE TO JUSTIFY REVIEW BY THIS COURT.

United States Supreme Court Rule 10 provides in pertinent part that, "A petition for writ of certiorari will be granted for only compelling reasons." The former rule read, "A petition for writ of certiorari will be granted only when there are special and important reasons therefore." In interpreting this rule, this Court in *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614, 99 L.Ed. 897 (1955) has stated that:

> A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (citations omitted) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is

---

[3] The trial transcript, as attached to petitioner's motion for post-conviction relief, reflects that there was testimony indicating that the knife in question, which had been admitted into evidence and was "published" to the jury, was not a "common" pocketknife.

especially true where the issues involved reach constitutional dimensions....

See also Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393, 43 S.Ct. 422, 67 L.Ed.2d 712 (1923) (" ...[i]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties").

Since the case for which certiorari review does not affect the public at large or many defendants presently incarcerated or that may be incarcerated in the future for the offense of armed burglary,[4] the case is not of sufficient compelling importance to justify certiorari review.

(4) THE DECISION OF THE FLORIDA SUPREME COURT WAS CORRECT.

The decision of the court in *Bunkley* was correctly decided. The decision of this Court in *Fiore* does not conflict with *Bunkley* because as stated earlier that case is both factually and legally distinguishable.

---

[4] The decision in *Bunkley* will not affect many defendants currently incarcerated for armed burglary nor will it effect future defendants charged with armed burglary. As the court noted in *L.B., supra* at 372 "we believe that in the vast majority of cases, it will be evident to citizens and fact-finders whether one's pocketknife is a 'common' pocketknife under any intended definition of that term." Furthermore, as stated earlier, even if the blade length is less than four inches in length does not mean that a pocketknife in question will always be determined to be a "common" pocketknife. *See J.D.L.R. v. State, supra*.

CONCLUSION

For the reasons set forth above herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT J. KRAUSS
Counsel of Record
Chief-Assistant Attorney General
Bureau Chief, Tampa Criminal Appeals
Florida Bar Number 0238538
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813)287-7900
Fax (813)281-5500

RONALD NAPOLITANO
Assistant Attorney General
Florida Bar Number 0130175

COUNSEL FOR RESPONDENT

NO. 02-8636

IN THE SUPREME COURT OF THE UNITED STATES

CLYDE TIMOTHY BUNKLEY, *Petitioner*

v.

STATE OF FLORIDA, *Respondent*

CERTIFICATE OF SERVICE

I, Robert J. Krauss, a member of the Bar of this Court, hereby certify that on this 21ST day of March, 2003, a copy of the Respondent's Brief in Opposition in the above entitled case was furnished by United States mail, postage prepaid, to Clyde T. Bunkley, pro se Petitioner, DOC # 051390, Avon Park Correctional Institution, P.O. Box 1100, Avon Park, FL 33826. I further certify that all parties required to be served have been served.

ROBERT J. KRAUSS
Counsel of Record
Chief-Assistant Attorney General
Bureau Chief, Tampa Criminal Appeals
Florida Bar Number 0238538
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813)287-7900
Fax (813)281-5500

COUNSEL FOR RESPONDENT

NO. 02-8636

IN THE SUPREME COURT OF THE UNITED STATES

CLYDE TIMOTHY BUNKLEY, *Petitioner*

v.

STATE OF FLORIDA, *Respondent*

AFFIDAVIT OF MAILING OPPOSITION TO CERTIORARI

Robert J. Krauss, being duly sworn, deposes and says:

I am a member of the Bar of the Supreme Court of the United States.

On March 21, 2003, at approximately 4:00 p.m., I deposited at the United States Postal Box, U.S. Regular Mail, a package addressed to the Clerk of the Supreme Court of the United States, postage prepaid, containing one original and ten copies of the brief in opposition to petition for a writ of certiorari in the above entitled case.

ROBERT J. KRAUSS
Counsel of Record
Chief-Assistant Attorney General
Bureau Chief, Tampa Criminal Appeals
Florida Bar Number 0238538
Concourse Center 4
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
(813)287-7900
Fax (813)281-5500

COUNSEL FOR RESPONDENT

Sworn & Subscribed before me,

NOTARY PUBLIC, State of Florida

DONNA R. COLLINS
MY COMMISSION # DD 132440
EXPIRES: August 10, 2006
Bonded Thru Notary Public Underwriters

(commission expiration)
Personally known by me ✓
Produced Identification _____
(check one)
Type of Identification Produced: _____

APR 18 PAGE 20

ORIGINAL

Supreme Court, U.S.
FILED
MAR 31 2003
CLERK

No. 02-8636

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2002

CLYDE TIMOTHY BUNKLEY - PETITIONER

VS.

STATE OF FLORIDA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

REPLY BRIEF

Clyde T. Bunkley, pro se
D.C. #051390
Avon Park Corr. Inst.
P.O. Box 1100
Avon Park, FL 33826-1100
(No Phone Number)

PROVIDED TO AVON PARK
CORRECTIONAL INSTITUTION
ON 31 March 2003
FOR MAILING.
C.B.

15 pp

TABLE OF CONTENTS

	Page #
Cover Sheet	i
Table of Contents	ii
Table of Authorities	iii - v
Argument in Reply	1- 9
Conclusion	9
Proof of Service	10

TABLE OF AUTHORITIES

CASES — Page *

Azzara v. Waller, 495 So.2d 277 (Fla. 2d DCA 1986) 5

Bass v. State, 172 So.2d 614 (Fla. 2d DCA 1965) 4

Blitch v. State, 194 So.2d 1 (Fla. 3d DCA 1967) 3

Bouie v. City of Columbia, 378 U.S. 347 (1964) 9

Buckley v. State, 833 So.2d 739 (Fla. 2002) 5, 8, 9

Commonwealth v. Branham, 8 Bush 387 (Kentucky) 3

Commonwealth v. Hawkins, 11 Bush 603 (Kentucky) 4

Commonwealth v. LeGrand, 9 A.2d 896 4

Crawford v. State, 662 So.2d 1016 (Fla. 5th DCA 1995) 4

Crumley v. State, 489 So.2d 112 (Fla. 1st DCA 1986) 4

Curris v. State, 647 So.2d 227 (Fla. 2d DCA 1994) 6

Davis v. State, 565 So.2d 826 (Fla. 5th DCA 1990) 3

Day v. State, 182 So.2d 266 (Fla. 2d DCA 1966) 3

Dozier v. State, 677 So.2d 1352 (Fla. 2d DCA 1996) 3

Fiore v. White, 149 F.3d 221 (3d Cir. 1998) 8

Fiore v. White, 531 U.S. 225 (2001) 4, 5, 8

Grayned v. City of Rockford, 408 U.S. 104 (1972) 9

Griffin v. State, 53 S.W. 848 (Texas) 3

Grimmage v. State, 835 So.2d 1124 (Fla. 2d DCA 2002) 6, 8

Gust v. State, 558 So.2d 450 (Fla. 1st DCA 1990) 2

J.D.L.R. v. State, 701 So.2d 626 (Fla. 3d DCA 1997) 7

King v. State, 21 So.2d 235, 74 Miss. 576 (Miss.) 4

TABLE OF AUTHORITIES

Page *

L.B. v. State, 700 So.2d 370 (Fla. 1997) 2, 5, 6, 7

McCoy v. State, 493 So.2d 1093 (Fla. 4th DCA 1986) 2

McCoy v. State, 789 So.2d 489 (Fla. 2d DCA 2001) 3

Maples v. State, 183 So.2d 736 (Fla. 3d DCA 1966) 3

Martin v. State, 747 So.2d 474 (Fla. 5th DCA 1999) 3

Morris v. State, 722 So.2d 849 (Fla. 1st DCA 1998) 4

People v. Vaines, 17 N.W.2d 729, 310 Mich. 500 4

Schad v. Arizona, 501 U.S. 624 (1991) 9

Schusler v. State, 760 So.2d 271 (Fla. 4th DCA 2000) 3

Schwarz v. Poehlmann, 178 Ill. App. 235 4

State v. Bennett, 87 S.W.2d 159 (Mo.) 4

State v. Davis, 720 So.2d 220 (Fla. 1998) 3

State v. Hardy, 8 S.W. 416, 95 Mo. 455 (Mo.) 4

State v. Jeffers, 490 So.2d 968 (Fla. 5th DCA 1986) 4

State v. Lee, 171 A. 195 (Del.) 3

State v. Nixon, 295 So.2d 121 (Fla. 3d DCA 1974) 2

State v. Ortiz, 504 So.2d 39 (Fla. 2d DCA 1987) 6

State v. Tremblay, 642 So.2d 64 (Fla. 4th DCA 1994) 2

State v. Walker, 137 S.E. 429, 193 N.C. 489 3

Taylor v. State, 672 So.2d 580 (Fla. 1st DCA 1996) 3

U.S. v. Garrett, 3 F.3d 390 (11th Cir. 1993) 4

U.S. v. Gholston, 932 F.2d 904 (11th Cir. 1991) 4

TABLE OF AUTHORITIES

	Page #
U.S. v. Gualdado, 794 F.2d 1533 (11th Cir. 1986)	3
U.S. v. Johnstone, 107 F.3d 200 (3d Cir. 1997)	4
U.S. v. Koonce, 991 F.2d 693 (11th Cir. 1993)	3
U.S. v. Riggins, 40 F.3d 1055 (9th Cir. 1994)	3
Werley v. State, 814 So2d 1159 (Fla. 1st DCA 2002)	3
Wilton v. State, 455 So2d 1142 (Fla. 2d DCA 1984)	4
FLORIDA STATUTES	
F.S. § 790.001 (13)	7
OTHER AUTHORITY	
Opinion of the Attorney General of Florida #051-358	6
Encyclopedia Americana, Grolier Publication (1995)	1
Random House Roget's Thesaurus (3d Ed. 1998)	5

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Clyde T. Bunkley, pro se, respectfully replies page-by-page as follows to the Respondents' brief filed March 21st, 2003.

On page #1 of Respondent's Brief in Opposition (hereinafter referred to as "R.B."), they misstate that the mandate issued on December 21, 2002. In fact, it issued on December 12, 2002. See Appendix "D" of petition.

On pages #2 and #7 of R.B., the quote from the trial transcript illuminates the misrepresentations made by a state witness used to sway the jury into finding the pocketknife to be a weapon. I.e. falsely stating that a knife without a locking blade is a "safety feature". In reality, a locking blade is a safety feature that prevents the blade from inadvertently closing on one's fingers. See Encyclopedia Americana, Vol. 16, pg. 505, "Pocketknives became very popular following World War I and are now available in a wide range of forms. The dangerous tendency of the blade to fold on the user's hand has been countered in some types by locking backs."

Not only did the State knowingly present this false testimony before the court; it went even further into theatrical error by repeatedly stabbing the exhibit knife into the podium and tossing the (open) knife to the Defendant during trial! See TR458. This resulted in the bailiff excitedly retrieving the knife from Defendant in front of the jury - further swaying the jury to believe the inherent danger of same. The jury was additionally misled by the trial court reinstructing them (after deliberations began) as to the definition of a deadly weapon (over defense objection).

Petitioner presents the preceding merely to illuminate that the jury decision was reached only through false testimony, prosecutorial misconduct, and trial court error. The law in Florida clearly established that a pocket-knife with blade of less than 4" length is by definition exempted from consideration, per se, as a deadly or dangerous weapon. See L.B. v. State, 700 So.2d 370 (Fla. 1997). The only way a common pocketknife could be considered a deadly weapon is if it is used in a manner that makes it deadly. See McCoy v. State, 493 So.2d 1093 (Fla. 4th DCA 1986); State v. Nixon, 295 So.2d 121 (Fla. 3d DCA 1974); Gust v. State, 558 So.2d 450 (Fla. 1st DCA 1990); State v. Tremblay, 642 So.2d 64 (Fla. 4th DCA

1994); Martin v. State, 747 So.2d 474 (Fla. 5th DCA 1999); McCoy v. State, 789 So.2d 489 (Fla. 2d DCA 2001). In the instant cause, Petitioner Bunkley never even had the pocketknife out of his pocket.

However, all sorts of innocuous everyday items have been found to be dangerous or deadly weapons when used in a dangerous manner: automobile[1], ax[2], baseball bat[3], BB gun[4], beer bottle[5], beer glasses[6], beer mug[7], belt[8], boat[9], boot[10], bottle[11], bricks[12], chisel[13], concrete block[14], crowbar[15], cue stick[16], cuspidor[17],

---

[1] State v. Davis, 720 So.2d 220 (Fla. 1998)
[2] State v. Walker, 137 S.E. 429, 193 N.C. 481
[3] Schuster v. State, 760 So.2d 271 (Fla. 4th DCA 2000)
[4] U.S. v. Koonce, 991 F.2d 693 (11th Cir. 1993)
[5] Worley v. State, 814 So.2d 1159 (Fla. 1st DCA 2002)
[6] Griffin v. State, 53 S.W. 848 (Texas)
[7] Blitch v. State, 194 So.2d 1 (Fla. 3d DCA 1967)
[8] U.S. v. Riggins, 40 F.3d 1055 (9th Cir. 1994)
[9] U.S. v. Gualdado, 794 F.2d 1533 (11th Cir. 1986)
[10] Davis v. State, 585 So.2d 826 (Fla. 5th DCA 1990)
[11] Day v. State, 182 So.2d 266 (Fla. 2d DCA 1966)
[12] State v. Lee, 171 A. 195 (Del.)
[13] Commonwealth v. Branham, 8 Bush 387 (Kentucky)
[14] Dozier v. State, 677 So.2d 1352 (Fla. 2d DCA 1996)
[15] Taylor v. State, 672 So.2d 580 (Fla. 1st DCA 1996)
[16] Maples v. State, 183 So.2d 736 (Fla. 3d DCA 1966)

desk.[18], dog[19], fence rail[20], flashlight[21], grapefruit[22], hammer[23], hoe[24], pellet rifle[25], rubber hose[26], scissors[27], shoe[28], table leg[29], tongs[30], toy gun[31], and a wrench[32].

On page *3 of R.B. there is an allusion to Fiore not being previously raised by either party. The reason is obvious when one considers that throughout the circuit court proceedings and the district court of appeal proceedings and the written briefing before the Florida Supreme Court - Fiore had yet

[17] Commonwealth v. LeGrand, 9 A.2d 896, 899
[18] U.S. v. Gholston, 932 F.2d 904 (11th Cir. 1991)
[19] Morris v. State, 722 So.2d 849 (Fla. 1st DCA 1998)
[20] King v. State, 21 So.2d 235, 74 Miss. 576 (Miss.)
[21] U.S. v. Johnstone, 107 F.3d 200 (3d Cir. 1997)
[22] Wilton v. State, 455 So.2d 1142 (Fla. 2d DCA 1984)
[23] Crawford v. State, 662 So.2d 1076 (Fla. 5th DCA 1995)
[24] State v. Bennett, 87 S.W.2d 159 (Mo.)
[25] State v. Jeffers, 490 So.2d 968 (Fla. 5th DCA 1986)
[26] Schwarz v. Poehlmann, 178 Ill. App. 235
[27] State v. Hardy, 8 S.W. 416, 95 Mo. 455 (Mo.)
[28] Bass v. State, 172 So.2d 614 (Fla. 2d DCA 1965)
[29] Crumley v. State, 489 So.2d 112 (Fla. 1st DCA 1986)
[30] Commonwealth v. Hawkins, 11 Bush 603 (Kentucky)
[31] U.S. v. Garrett, 3 F.3d 390 (11th Cir. 1993)
[32] People v. Vaines, 17 N.W.2d 729, 310 Mich. 500

to be decided! As to why Petitioner's counsel failed to file a supplemental brief after Fiore issued, and why counsel was totally unfamiliar with Fiore during oral arguments; this pse se Petitioner can only assume gross incompetence on his counsel's part (with the resultant prejudice to his case imposed by this ineffectiveness).

On pages *3 and *8 of R.B., much ado is made over the same trial transcript quote regarding the knife in question being "a little bit larger than a natural pocketknife". However, even Roget does not show the words "natural" and "common" to be synonyms. See Roget's Thesaurus.

On pages *4, *9 and *13 of R.B., a quote from Bunkley v. State is repeatedly given regarding L.B. being an "evolutionary process". Petitioner previously pointed out that this is untrue. Merely because a court claims something to be an evolutionary process does not make it so. As Shakespeare noted, "[a rose] by any other word would smell as sweet." See Azzara v. Waller, 495 So.2d 277, 279 (Fla. 2d DCA 1986). L.B. sure doesn't smell evolutionary!

The Florida Supreme Court had NO prior decisions relating to the definition of a "common pocketknife"; therefore L.B. represents anything BUT an evolutionary process.

Also, on pages *4 and *9 of R.B., that court quote shows another error in their broad assumption that "none of the courts attempted to impose criminal sanctions without statutory authority", without first doing an exhaustive case-by-case review of every Florida case involving a pocketknife. This instant case is but one. See also State v. Ortiz, 504 So.2d 39 (Fla 2d DCA 1987); Curris v. State, 647 So.2d 227 (Fla 2d DCA 1994); Grimmage v. State, 835 So.2d 1124 (Fla 2d DCA 2002)(Table).

On pages *5 and *14 of R.B., it is incorrectly stated that, "In 1987, the law did not exempt" a pocketknife with 4" or less blade. This statement ignores not only the 1951 Opinion of the Attorney General of Florida, it also ignores the fact that L.B. was decided on the exact same statutory language.

On page *6 of R.B., part of the quote from L.B. mentions "smaller but more expensive knives" as

being also exempt under the 4" rule. This is exactly where Petitioner's pocketknife falls! It had a 2½"-3" blade (approximately 1" less than L.B.'s) and was also a more expensive pocketknife than some, as it had the added (safety) feature of a locking blade.

On page *8 of R.B., the state caselaw of J.D.L.R. is presented in an attempt to overshadow L.B. J.D.L.R. was never appealed to the Florida Supreme Court for a ruling, so the DCA rejection of the L.B. 4" standard in an anomaly - not an evolution. Further, the knife in J.D.L.R. had a "3½" blade, noted combat-style grip and large metal hilt guard". In the instant cause, Bunkley's pocketknife was an inch shorter and did NOT have a combat-style grip OR a metal hilt guard.

On page *9 of R.B., it should be noted that the language of F.S. §790.001(13) has not been changed from well before 1987 to date. Therefore, the L.B. decision in 1997 defined the pocketknife exemption as it has always been - all the way back to the original wording (of §710.001(13)) in 1901.

On page *10 of R.B., the State unbelievably uses the case of Fiore v. White, 149 F.3d 221 (3d Cir. 1998) to support their proposition that this is merely a matter of state law - not one for this Court to exercise its certiorari jurisdiction. Is it possible the State failed to recognize Fiore, supra, as the exact same case reversed by this Court, and now relied on here ?!?

On page *16 of R.B., a bald fallacy is presented supposing that, "not many defendants" will be affected by the decision in Bunkley. This incarcerated, indigent prisoner lacks the research capabilities of the Respondents; but, he does know for a fact that at least one other prisoner at his present facility (out of 800 or so prisoners) is directly affected (i.e. Randy Grimmage). If two out of 800 is a fair representative ratio, then out of 72,000 (plus) state prisoners in Florida this case affects approximately 180 of them!

Furthermore, the Bunkley decision is of importance to the public in respect to the Florida Supreme Court's blatent disregard for this Court's Fiore decision. The ultimate arbiter of federal

constitutional rights is the Supreme Court of the United States - not the Florida Supreme Court.

If the Bunkley decision is allowed to stand, no one in Florida will know if their pocketknife is a deadly weapon or not. This, too, is an open violation of the right to due process of law. See Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Schad v. Arizona, 501 U.S. 624, 633 (1991); Bouie v. City of Columbia, 378 U.S. 347, 350-51 (1964).

Conclusion

For reasons set forth herein and in his petition, Petitioner Bunkley prays the petition for writ of certiorari be granted.

Respectfully submitted,

Clyde T. Bunkley

Clyde T. Bunkley, pro se

Date: 3/31/03

No. 02-8636

IN THE

SUPREME COURT OF THE UNITED STATES

CLYDE TIMOTHY BUNKLEY - PETITIONER

VS.

STATE OF FLORIDA - RESPONDENT

PROOF OF SERVICE

I, Clyde Timothy Bunkley, do swear that on this date, March 31, 2003, as required by Supreme Court Rule 29, I have served the enclosed REPLY BRIEF on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above document in the hands of local prison officials for mailing via U.S. Mail, properly addressed and with first class postage attached.

The name and address of the Respondents is as follows: Office of the Attorney General, 2002 N. Lois Ave., Suite 700, Tampa, Florida 33607-2367.

I DECLARE UNDER PENALTY OF PERJURY that the foregoing is true and correct.

Clyde T. Bunkley pro se

Clyde T. Bunkley, Petitioner

Per Curiam

SUPREME COURT OF THE UNITED STATES

CLYDE TIMOTHY BUNKLEY *v.* FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 02–8636. Decided May 27, 2003

PER CURIAM.

Clyde Timothy Bunkley petitions for a writ of certiorari, arguing that the Florida Supreme Court contradicted the principles of this Court's decision in *Fiore* v. *White*, 531 U. S. 225 (2001) *(per curiam)*, when it failed to determine whether the "common pocketknife" exception to Florida's definition of a "'[w]eapon'" encompassed Bunkley's pocketknife at the time that his conviction became final in 1989. Fla. Stat. §790.001(13) (2000). We agree, and therefore grant Bunkley's motion to proceed *in forma pauperis* and his petition for a writ of certiorari.

I

In the early morning hours of April 16, 1986, Bunkley burglarized a closed, unoccupied Western Sizzlin' Restaurant. Report and Recommendation in No. 91–113–CIV–T–99(B) (MD Fla.), p. 1. The police arrested him after he left the restaurant. At the time of his arrest, the police discovered a "pocketknife, with a blade of 2½ to 3 inches in length, . . . folded and in his pocket." 768 So. 2d 510 (Fla. App. 2000) *(per curiam)*. "There is no evidence indicating Bunkley ever used the pocketknife during the burglary, nor that he threatened anyone with the pocketknife at any time." *Ibid.*

Bunkley was charged with burglary in the first degree because he was armed with a "dangerous weapon"—namely, the pocketknife. Fla. Stat. §810.02(2)(b) (2000). The punishment for burglary in the first degree is "imprisonment for a term of years not exceeding life imprison-

ment." §810.02(2). If the pocketknife had not been classified as a "dangerous weapon," Bunkley would have been charged with burglary in the third degree. See 833 So. 2d 739, 742 (Fla. 2002). Burglary in the third degree is punishable "by a term of imprisonment not exceeding 5 years." Fla. Stat. §775.082(3)(d) (2002); see also 833 So. 2d, at 742. Bunkley was convicted of burglary in the first degree. He was sentenced to life imprisonment. In 1989, a Florida appellate court affirmed Bunkley's conviction and sentence. See 539 So. 2d 477.

Florida law defines a "'[w]eapon'" to "mea[n] any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common pocketknife." §790.001(13). Florida has excepted the "'common pocketknife'" from its weapons statute since 1901, and the relevant language has remained unchanged since that time. See 833 So. 2d, at 743.

In 1997, the Florida Supreme Court interpreted the meaning of the "common pocketknife" exception for the first time. In *L. B.* v. *State*, 700 So. 2d 370, 373 *(per curiam)*, the court determined that a pocketknife with a blade of 3¾ inches "plainly falls within the statutory exception to the definition of 'weapon' found in section 790.001(13)." The complete analysis of the Florida Supreme Court on this issue was as follows: "In 1951, the Attorney General of Florida opined that a pocketknife with a blade of four inches in length or less was a 'common pocketknife.' The knife appellant carried, which had a 3¾-inch blade, clearly fell within this range." *Ibid.* (citation omitted). The Florida Supreme Court accordingly vacated the conviction in *L. B.* because the "knife in question was a 'common pocketknife' under any intended definition of that term." *Ibid.* Justice Grimes, joined by Justice Wells, wrote an opinion agreeing with the majority's resolution of the case "[i]n view of the Attorney General's opinion and the absence of a more definitive description of a common pocketknife." *Ibid.*

After the Florida Supreme Court issued its decision in *L. B.*, Bunkley filed a motion for postconviction relief under Florida Rule of Criminal Procedure 3.850 (1999). Bunkley alleged that under the *L. B.* decision, his pocketknife could not have been considered a "weapon" under §790.001(13). He therefore argued that his conviction for armed burglary was invalid and should be vacated because a "common pocketknife can not *[sic]* support a conviction involving possession of a weapon." App. to Pet. for Cert. C–2. The Circuit Court rejected Bunkley's motion, and the District Court of Appeal of Florida, Second District, affirmed. 768 So. 2d 510.

The Florida Supreme Court also rejected Bunkley's claim. It held that the *L. B.* decision did not apply retroactively. Under Florida law, only "jurisprudential upheavals" will be applied retroactively. 833 So. 2d, at 743 (internal quotation marks omitted). The court stated that a "jurisprudential upheaval is a *major* constitutional change of law." *Id.*, at 745 (internal quotation marks omitted). By contrast, any "evolutionary refinements" in the law "are not applied retroactively." *Id.*, at 744. The court then held that *L. B.* was an evolutionary refinement in the law, and therefore Bunkley was not entitled to relief. In a footnote, the Florida Supreme Court cited our decision in *Fiore* v. *White*, *supra*, and held without analysis that *Fiore* did not apply to this case. See 833 So. 2d, at 744, n. 12.*

---

*The dissent claims that the Florida Supreme Court did not need to decide anything other than whether *L. B.* was a change in the law. See *post*, at 3 (citing Fla. Rule Crim. Proc. 3.850(b)(2) (2000)). Yet as the dissent concedes, see *post*, at 1–2, the Florida Supreme Court passed upon the *Fiore* due process inquiry as well as the retroactivity question. The dissent also notes that Bunkley has raised the issue of the common pocketknife in prior appeals. These appeals, however, were filed *prior* to the Florida Supreme Court's opinion in *L. B.* And we agree with the dissent that absent the *L. B.* decision, Bunkley would not be able to

Justice Pariente, joined by Chief Justice Anstead, dissented. She stated that the Florida Supreme Court's decision in *L. B.* "should be applied to grant Bunkley collateral relief." 833 So. 2d, at 746. She criticized the majority opinion for relying solely on a retroactivity question. In her view, "application of the due process principles of *Fiore* renders a retroactivity analysis . . . unnecessary." *Id.*, at 747. She noted that even if *L. B.* was merely an evolutionary refinement of the law, "the majority offers no precedent laying out the stages of this evolution." 833 So. 2d, at 747. Because she thought the *L. B.* decision "correctly stated the law at the time Bunkley's conviction became final," she would have vacated Bunkley's conviction. 833 So. 2d, at 747.

II

Fiore v. *White* involved a Pennsylvania criminal statute that the Pennsylvania Supreme Court interpreted for the first time after the defendant Fiore's conviction became final. See 531 U. S., at 226. Under the Pennsylvania Supreme Court's interpretation of the criminal statute, Fiore could not have been guilty of the crime for which he was convicted. See *id.*, at 227–228. We originally granted certiorari in *Fiore* to consider "when, or whether, the Federal Due Process Clause requires a State to apply a new interpretation of a state criminal statute retroactively to cases on collateral review." *Id.*, at 226. "Because we were uncertain whether the Pennsylvania Supreme Court's decision . . . represented a change in the law," we certified a question to the Pennsylvania Supreme Court.

---

pursue his claim now. The Florida Supreme Court committed an error of law here by not addressing whether the *L. B.* decision means that at the time Bunkley was convicted, he was convicted of a crime—armed burglary—for which he may not be guilty. Therefore, *Michigan* v. *Long*, 463 U. S. 1032 (1983), has no applicability here.

Id., at 228. This question asked whether the Pennsylvania Supreme Court's interpretation of the statute "'state[d] the correct interpretation of the law of Pennsylvania at the date Fiore's conviction became final.'" *Ibid.*

When the Pennsylvania Supreme Court replied that the ruling "'merely clarified the plain language of the statute,'" *ibid.*, the question on which we originally granted certiorari disappeared. Pennsylvania's answer revealed the "simple, inevitable conclusion" that Fiore's conviction violated due process. *Id.*, at 229. It has long been established by this Court that "the Due Process Clause . . . forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Id.*, at 228–229. Because Pennsylvania law—as interpreted by the later State Supreme Court decision—made clear that Fiore's conduct did not violate an element of the statute, his conviction did not satisfy the strictures of the Due Process Clause. Consequently, "retroactivity [was] not at issue." *Id.*, at 226.

Fiore controls the result here. As Justice Pariente stated in dissent, "application of the due process principles of *Fiore*" may render a retroactivity analysis "unnecessary." 833 So. 2d, at 747. The question here is not just one of retroactivity. Rather, as *Fiore* holds, "retroactivity is not at issue" if the Florida Supreme Court's interpretation of the "common pocketknife" exception in *L. B.* is "a correct statement of the law when [Bunkley's] conviction became final." 531 U. S., at 226. The proper question under *Fiore* is not whether the law has changed. Rather, *Fiore* requires that the Florida Supreme Court answer whether, in light of *L. B.*, Bunkley's pocketknife of 2½ to 3 inches fit within §790.001(13)'s "common pocketknife" exception at the time his conviction became final.

Although the Florida Supreme Court has determined that the *L. B.* decision was merely an "evolutionary refinement" in the meaning of the "common pocketknife"

exception, it has not answered whether the law in 1989 defined Bunkley's 2½- to 3-inch pocketknife as a "weapon" under §790.001(13). Although the *L. B.* decision might have "culminat[ed] ... [the] century-long evolutionary process," the question remains about what §790.001(13) meant in 1989. 833 So. 2d, at 745. If Bunkley's pocketknife fit within the "common pocketknife" exception to §790.001(13) in 1989, then Bunkley was convicted of a crime for which he cannot be guilty—burglary in the first degree. And if the "stages" of §790.001(13)'s "evolution" had not sufficiently progressed so that Bunkley's pocketknife was still a weapon in 1989, this case raises the issue left open in *Fiore*.

It is true that the Florida Supreme Court held *Fiore* inapplicable because the *L. B.* decision was a change in the law which "culminat[ed] [the] century-long evolutionary process." 833 So. 2d, at 745. As the dissent acknowledges, however, see *post*, at 1–2, n. 1, the Florida Supreme Court's decision in *L. B.* cast doubt on the validity of Bunkley's conviction. For the first time, the Florida Supreme Court interpreted the common pocketknife exception, and its interpretation covered the weapon Bunkley possessed at the time of his offense. In the face of such doubt, *Fiore* entitles Bunkley to a determination as to whether *L. B.* correctly stated the common pocketknife exception at the time he was convicted. Ordinarily, the Florida Supreme Court's holding that *L. B.* constitutes a change in—rather than a clarification of—the law would be sufficient to dispose of the *Fiore* question. By holding that a change in the law occurred, the Florida Supreme Court would thereby likewise have signaled that the common pocketknife exception was narrower at the time Bunkley was convicted.

Here, however, the Florida Supreme Court said more. It characterized *L. B.* as part of the "century-long evolutionary process." 833 So. 2d, at 745. Because Florida law

was in a state of evolution over the course of these many years, we do not know what stage in the evolutionary process the law had reached at the time Bunkley was convicted. The Florida Supreme Court never asked whether the weapons statute had "evolved" by 1989 to such an extent that Bunkley's 2½- to 3-inch pocketknife fit within the "common pocketknife" exception. The proper question under *Fiore* is not just *whether* the law changed. Rather, it is *when* the law changed. The Florida Supreme Court has not answered this question; instead, it appeared to assume that merely labeling *L. B.* as the "culmination" in the common pocketknife exception's "century-long evolutionary process" was sufficient to resolve the *Fiore* question. 833 So. 2d, at 745. It is not. Without further clarification from the Florida Supreme Court as to the content of the common pocketknife exception in 1989, we cannot know whether *L. B.* correctly stated the common pocketknife exception at the time he was convicted.

On remand, the Florida Supreme Court should consider whether, in light of the *L. B.* decision, Bunkley's pocketknife of 2½ to 3 inches fit within §790.001(13)'s "common pocketknife" exception at the time his conviction became final. The judgment of the Supreme Court of Florida, accordingly, is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

CLYDE TIMOTHY BUNKLEY *v.* FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 02–8636. Decided May 27, 2003

CHIEF JUSTICE REHNQUIST, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, dissenting.

The Court here makes new law, and does so without briefing or argument. In *Fiore* v. *White*, 528 U. S. 23, 29 (1999), we granted certiorari to answer whether due process requires a state court to apply a judicially announced change in state criminal law retroactively. We realized after granting certiorari, however, that we could not answer that question until we knew whether there had been a change in the law at all. We therefore certified a question to the Pennsylvania Supreme Court asking whether its decision in *Commonwealth* v. *Scarpone*, 535 Pa. 273, 279, 634 A. 2d 1109, 1112 (1993), was a change in the law from the time of the defendant's conviction. When the Pennsylvania Supreme Court answered that there had been no change, we acknowledged that there was no question of retroactivity left for us to answer. *Fiore* v. *White*, 531 U. S. 225, 226 (2001) *(per curiam)*.

In the present case, the Court concedes that the Florida Supreme Court acknowledged our opinion in *Fiore*. The Florida Supreme Court concluded that its decision in *L. B.* v. *State*, 700 So. 2d 370 (1997) *(per curiam)*, decided after petitioner's conviction became final, marked a change in Florida law. 833 So. 2d 739, 744, n. 12 (2002).[1] The state

---

[1] Petitioner presents strong arguments in favor of his view that the bright-line rule set out in *L. B.* existed as a matter of Florida law at the time of his conviction. Pet. for Cert. 6. But the Florida Supreme Court

4 pp

court therefore considered whether the change should be applied retroactively, and concluded that it should not be.

The Court recognizes, as it must, that the Florida Supreme Court concluded that *L. B.* was a change in the law from the time of petitioner's conviction. *Ante*, at 6 ("It is true that the Florida Supreme Court held . . . [that] the *L. B.* decision was a change in the law"). Yet the Court criticizes the Florida Supreme Court for thinking that conclusion "sufficient to dispose of the *Fiore* question." *Ibid.* The Court acknowledges that "[o]rdinarily, the Florida Supreme Court's holding that *L. B.* constitutes a change in—rather than a clarification of—the law would be sufficient to dispose of the *Fiore* question," but then holds that, because the Florida Supreme Court "characterized *L. B.* as part of the 'century-long evolutionary process,'" *Fiore* requires that court to answer an additional question: whether petitioner's knife fit within the "'common pocketknife'" exception at the time of his conviction. *Ante*, at 7.

Fiore requires no such thing. *Fiore* asked whether a change had occurred and, upon finding that none had, ended the inquiry. The Court here goes much further. It acknowledges that *L. B.* neither clarified the law that was in existence at the time of petitioner's conviction nor changed the law with retroactive effect. Yet it nonetheless insists that the Florida Supreme Court reevaluate the sufficiency of the evidence in this case. See *ante*, at 5, 7 (holding that Florida Supreme Court must answer whether "Bunkley's pocketknife . . . fit within [Fla. Stat.] §790.001(13)'s 'common pocketknife' exception at the time his conviction became final"). The Court announces this conclusion as a matter of "*Fiore*" without explaining why due process requires it. The Court's holding is a new one,

---

concluded otherwise, and we may not revisit that question.

and its criticism of the state court for failing to anticipate this holding is unjustified.[2] The Florida Supreme Court, moreover, has essentially answered the question on which the Court now remands.[3]

The Court's decision to expand *Fiore* is not only new, it also unjustifiably interferes with States' interest in finality. The Florida courts have already considered several times the question this Court now asks them to answer. On direct appeal, petitioner specifically argued that a knife with a blade of less than four inches was a "common pocketknife," and he cited the 1951 opinion letter issued by the Florida Attorney General on this issue. Brief for Appellant in No. 88–1376 (Fla. Dist. Ct. App.), pp. 5–6. Petitioner also filed two motions for state postconviction relief challenging the sufficiency of the evidence with respect to the jury's conclusion that he was armed with a dangerous weapon. See Motion to Set Aside or Vacate

---

[2]The Court further criticizes the Florida Supreme Court for its workmanship in the decision under review. Thus, while it recognizes the Florida court's conclusion that *L. B.* did not state the law at the time of petitioner's conviction, the Court reprimands the Florida court for failing to reach its holding in a sufficiently clear manner. See, *e.g.*, *ante*, at 7 ("Without further clarification from the Florida Supreme Court . . . we cannot know whether *L. B.* correctly stated the common pocketknife exception at the time [petitioner] was convicted"). This rebuke to the state court violates the well-established rule that this Court will not "require state courts to reconsider cases to clarify the grounds of their decisions." *Michigan* v. *Long*, 463 U. S. 1032, 1040 (1983); see also *id.*, at 1041 (noting the Court's desire to "avoi[d] the unsatisfactory and intrusive practice of requiring state courts to clarify their decisions to the satisfaction of this Court").

[3]The state court explained that "[a]lthough some courts" prior to *L. B.* "may have interpreted 'common pocketknife' contrary to the holding in *L. B.*, each court nevertheless sought to comply with legislative intent and to rule in harmony with the law as it was interpreted at that point in time." 833 So. 2d 739, 745 (Fla. 2002). Thus, the court explained, "none of the convictions imposed pursuant to section 790.001(13) violated the Due Process Clause." *Ibid.*

Judgment and Sentence in No. 86–1070–CF–A–N1 (Fla. Cir. Ct.), p. 4; Petition to Invoke "All Writs" Jurisdiction in No. 85–778 (Fla. Sup. Ct.), p. 4.[4]

Florida has established a 2-year period of limitations for filing motions for postconviction relief. Florida Rule of Criminal Procedure 3.850 "provides an exception to the two-year time limitation for filing postconviction motions where 'a fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.' " 768 So. 2d 510, 511 (Fla. App. 2000) *(per curiam)* (quoting Fla. Rule Crim. Proc. 3.850(b)(2) (2000)). The Court's decision here overrides Florida's Rule, authorizing claims for postconviction relief where there has been a change in the law that has specifically been held *not* to apply retroactively.

The Court's holding expanding *Fiore* is striking, and the Court's decision to adopt it summarily is even more so. I would deny the petition for writ of certiorari.

---

[4]Petitioner also unsuccessfully raised this claim twice in Federal District Court. See Report and Recommendation in No. 91–113–CIV–T–99(B) (MD Fla.), p. 5; Memorandum of Law in Support of Petition for Writ of Habeas Corpus under U. S. C. Section 2254 in No. 96–405–Civ.–T–24C (MD Fla.), p. 5.